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The Brazilian law of democracy and its implications for competition law

Guerra De Andrade Filho, Arthur

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THE BRAZILIAN LAW OF DEMOCRACY AND ITS IMPLICATIONS FOR COMPETITION LAW

Arthur Guerra de Andrade Filho

King's College London

PhD Thesis in Law

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ABSTRACT

For many, including the majority of the Supreme Court in the *ADI 4650* case, war chest and dependence corruption apparently occurred in Brazil. This thesis investigates, through case studies, whether the appearance of those types of political finance corruption impacted the confidence we should have in the democratic integrity of antitrust legislation and its enforcement; and concludes that this confidence has been impaired, at least partially.

Considering that, when it comes to political finance corruption, mere appearance is enough to justify regulatory reforms, the question that then arises is how the law of democracy should be framed to promote the appearance of electoral integrity. The thesis advances a proposal to foster the appearance that elections reflect a ‘free formation of public opinion’, and, in that sense, it argues that political finance and media regulation should adopt that as a paradigm. By arguing that legislation aimed to promote media access and impartiality of broadcast corporations during elections is not (and perhaps will never be) enough to satisfactorily diminish the influence of media economic power over elections in Brazil, the thesis proposes media regulation based on both democratic distribution and the power to impact public opinion. When it comes to the competition between political parties and their candidates, the thesis argues that vouchers could help to solve the controversy regarding the distribution of parties’ public resources but that, in any event, caps should be introduced to prevent predominant influence on public opinion. The paradigm also provides an answer to the dilemma faced by judges whenever they must determine what level of illegal spending is sufficient to distort an election: under a Rawlsian account of democracy, if the illegal practice allowed the candidate to have more than 30% of total electoral spending, there is a presumption that it distorted the election — under a Schumpeterian perspective of democracy, that threshold could be adjusted to 50%.

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TABLE OF CONTENTS

Abstract	2
Acknowledgements	3
Table of Figures	8
Chapter 1. Introduction	9
1.1. Introduction	9
1.2. The different forms of business influence over government	10
1.3. The scope of the thesis	20
1.4. The map of the thesis	24
Part A: The Brazilian law of democracy	
Chapter 2. The Brazilian context	29
2.1. Introduction	29
2.2. The party system	30
2.3. The system of government	37
2.4. The electoral system	39
2.5. Are the current Brazilian parties strong or weak?	41
2.6. The media system	43
2.7. Conclusion of the chapter	49
Chapter 3. The political finance legislation in Brazil	51
3.1. Introduction	51
3.2. Regulatory objectives	52
3.3. Regulatory strategies	55
3.4. The transformation of the political finance system: from corporate to mixed	68
3.5. Conclusion of the chapter	73

**Part B: The implications of the Brazilian political finance system for competition
law**

Chapter 4. The sufficiency of appearance in matters concerning political finance corruption	75
4.1. Introduction	75
4.2. The sufficiency of appearance in matters involving political finance law in Brazil	76
4.3. Why the mere appearance is enough?	80
4.4. The appearance of corruption of the rules of the economic system	88
4.5. Conclusion of the chapter	89
 Chapter 5. The impact of corporate donations on the Competition Act 2011	 90
5.1. Introduction	90
5.2. The business elites' lobby on competition bills (1945–1994)	93
5.3. The legislative process of the Competition Act 2011	106
5.4. The possible explanations for the pattern found	134
5.5. Conclusion of the chapter	148
 Chapter 6. The repercussion of elections on antitrust enforcement	 150
6.1. Introduction	150
6.2. The impact of political finance on the democratic controls on Cade	155
6.3. The impact of political finance on the pressure or contact made by politicians on Cade	172
6.4. The efforts of politicians to influence antitrust enforcement concerning big donors	187
6.5. Conclusion of the chapter	199

Part C: A proposal for reform

Chapter 7. The foundations for a regulation of the economic resources that enable concentration of political speech	203
7.1. Introduction	203
7.2. The Brazilian egalitarian model of electoral regulation	205
7.3. The regulation of the forum of political deliberation	214
7.4. Conclusion of the chapter	235
 Chapter 8. The regulation of non-candidate citizens and their groups	 236
8.1. Introduction	236
8.2. The regulation of the typical economic power	237
8.3. The regulation of the media	243
8.4. Conclusion of the chapter	273
 Chapter 9. The regulation of the competition between political parties and their candidates	 277
9.1. Introduction	277
9.2. The Brazilian legislative framework on the competition between parties	279
9.3. The Brazilian Supreme Court and the principle of equality of opportunity between political parties	280
9.4. A proposal for the regulation of parties' resources to compete	289
9.5. The sanctions	295
9.6. Conclusion of the chapter	297
 Chapter 10. The conclusions of the thesis	 299
10.1. The summary of the thesis	299
10.2. The challenges ahead	307
 Appendix. Questionnaire — political pressure — former commissioners of Cade	 310
 Bibliography	 322

Table of Figures

Figure 5.1. The pattern between campaign finance and amendments on list of anticompetitive practices	127
Figure 5.2. The pattern between campaign finance and amendments on fines for anticompetitive practices	128
Figure 5.3. The pattern between campaign finance and amendments on submissions of cases to merger review	129
Figure 6.1. The structure of Brazilian antitrust enforcement	162
Figure 8.1. Jornal Nacional's coverage of parties during the 2014 presidential election	257
Figure 8.2. Jornal Nacional's coverage of candidates during the 2014 presidential election	257

Chapter One

Introduction

1.1. Introduction

In a capitalist democracy, people frequently lobby the government — both legislative and executive branches. They lobby mainly because those government institutions are responsible for the enactment of legislation and policies that regulate society. People can lobby individually or as a group, often organised as legal entities, such as corporations, associations and unions.

There is a perception that corporate lobbying is quite effective. For example, Martin Gilens and Benjamin Page have recently conducted the largest empirical study of policy decisions by the US government in the history of political science.¹ And they concluded that ‘economic elites and organised groups representing business interests have substantial independent impacts on the US government policy, while mass-based interest groups and average citizens have little or no independent influence’.² The impression that corporate lobbying is more effective than others is shared by many, perhaps most, capitalist democracies.³

But why may corporate lobbying be so effective? There might be two main reasons. Firstly, corporations have a structurally privileged position in capitalist

¹ Lawrence Lessig, ‘Institutional Corruption—Congress: The Paradigm Case’ (*The Randy L and Melvin R Berlin Family Lectures at the University of Chicago*, 20 October 2014) at 34:30 <<https://youtu.be/CgAcGuxy-yo>> accessed 4 November 2017.

² Martin Gilens and Benjamin I Page, ‘Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens’ (2014) 12 *Perspectives on politics* 564–565.

³ See, eg, Wolfgang Streeck, *How Will Capitalism End?: Essays on a Failing System* (Verso Books 2016) 74.

democracies. Secondly, corporations and businessmen tend to have greater economic resources than other groups and individuals, and they frequently use these resources in order to enhance political power.⁴

The present chapter is introductory and aims to delineate the scope of the thesis. It will first try to explain some of the different forms of business influence over government. The next section will then delimit that the central focus of this thesis will be political finance. Finally, I will provide a structure of the thesis.

1.2. The different forms of business influence over government

This section will briefly address the different forms of business influence over government by discussing: (i) the privileged position of business in capitalist democracies and (ii) some of the corporate expenses.

1.2.1. The privileged position of companies in capitalist democracies

In his classic *Politics and Markets: The World's Political Economic Systems*, Charles Lindblom argued that business enjoys a structurally privileged position in capitalist democracies. His main point is that governments have a responsibility for avoiding inflation, unemployment, and economic depression; and a failure to achieve

⁴ I take political power as 'the ability to influence political decisions', as defined by David Copp, 'Capitalism versus Democracy: The Marketing of Votes and the Marketing of Political Power' in John Douglas Bishop (ed), *Ethics and Capitalism* (University of Toronto Press 2000) 89. However, it should be noted that 'political power' is frequently used by Brazilians as a synonym for 'institutionalised political power', that is, the elected politicians who occupy the legislative and executive branches. Therefore, in some of the quotations from Brazilian actors along this thesis, 'political power' is used as 'institutionalised political power'. Another term that will be extensively used throughout this thesis is 'economic power'. I take economic power as the power that derives from the private ownership of financial resources, or other forms of private assets. But many Brazilians use it as a synonym for corporations and businessmen. Therefore, in some of the quotations from Brazilian actors along this thesis, economic power is used in that sense.

these goals can bring governments down. As a consequence, ‘government officials cannot be indifferent to how well business performs its functions’, so they encourage businessmen to perform.⁵

In this context, the argument follows, businessmen frequently ask ‘indulgences’ from the government, such as tax offsets, weak antitrust enforcement, and so on. And governments in capitalist democracies will seriously weigh these requests. A government official ‘does not have to be bribed, duped or pressured to do so’.⁶ The government official will acknowledge that the unspoken adversity for business may result in misfortune for the government if it results in inflation, unemployment, or economic depression. Thus, the official may favour corporations on a certain issue because he believes in the economic importance of companies to generate jobs, promote growth, control inflation, generate production, tax revenues, and so forth. Businesses have, therefore, an organic advantage in capitalist democracies; a special political leverage.

As a rule, the larger the company is, the larger its importance for the economy of a given country may be. This notion has led to the so-called *too big to fail* problem — governments must save failing companies that are enormously important to the national economy.⁷ The bankruptcy of these companies would harm the national economy to the extent that governments feel compelled to provide publicly funded bailouts. Perhaps the foremost example is the US Government’s bailout in response to the 2007–2008

⁵ Charles Edward Lindblom, *Politics and Markets: The World's Political-Economic Systems* (Basic Books 1977) 172.

⁶ Ibid 174.

⁷ L A Cunningham, 'Too Big to Fail: Moral Hazard in Auditing and the Need to Restructure the Industry Before It Unravels' (2006) 106 Columbia Law Review 1698 1698.

financial crisis, formalised by the Emergency Economic Stabilization Act of 2008,⁸ which arguably favoured financial corporations.⁹

There has also been discussion of whether globalisation has fostered the ‘privileged’ position of companies. According to this view, globalisation would have enhanced ‘the structural power of corporate capital because business can threaten to invest elsewhere if national regulation is unfavourable’.¹⁰ As a consequence, states would have begun to compete ‘for the approval of international business by creating a low-cost, business-friendly environment for investment’.¹¹ However, empirical studies have reached controversial conclusions — for example, researchers have found conflicting results regarding countries’ ability to tax business or business executives in a globalised economy.¹²

Finally, another structural issue is that there might be a collective action problem. As argued by Mancur Olson, smaller groups might be more capable than larger groups of clearly understanding what affects them, and organising themselves to pursue collective action to defend their interests.¹³ Since businesses are usually smaller in number than other groups, such as workers and consumers, they would also have a competitive advantage in lobbying in this regard.

⁸ Division A of Public Law 110–343, 122 Stat 3765, enacted October 3, 2008.

⁹ See, eg, Lawrence J White, ‘The Basics of Too Big to Fail’, *Perspectives on Dodd-Frank and Finance* (MIT Press 2014).

¹⁰ Gregory C Shaffer, ‘Law and Business’ in David Coen, Wyn Grant and Graham K Wilson (eds), *The Oxford Handbook of Business and Government* (Oxford University Press 2010) 4.

¹¹ Stephen Wilks, *The Political Power of the Business Corporation* (Edward Elgar 2013) 29.

¹² David Coen, Wyn Grant and Graham K Wilson, ‘Political Science: Perspectives on Business and Government’ in David Coen, Wyn Grant and Graham K Wilson (eds), *The Oxford Handbook of Business and Government* (Oxford University Press 2010) 20, 20–21. Moreover, the authors have argued that ‘there are few if any known instances of governments repealing environmental or consumer protection regulations to attract or retain businesses’. *Ibid.*

¹³ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965).

1.2.2. Corporate expenses

There are many ways through which corporate and businessmen's expenses may enhance their political power. This subsection will address four of them: (i) political donations and independent expenditures; (ii) the core business of media corporations; (iii) soft expenses, such as funding think-tanks; and (iv) influence over suppliers and employees. Although these strategies are particularly important in electoral periods, they are not limited to them. As the European Court of Human Rights (ECtHR) pointed out in *Animal Defenders International v United Kingdom*, 'the democratic process is a continuing one to be nurtured at all times [...]'.¹⁴

1.2.2.1. Political donations and expenditures

Companies and businessmen may try to directly influence the political process by making an effort to influence the cornerstone of democracy: elections. In this regard, they frequently make contributions to political parties and their politicians. And these donations help politicians to pursue more votes, by enabling the party and candidate to pay for the production of media content, media access, transportation, staff, and so forth. Similarly, corporations and businessmen can make independent expenditures to favour a given party or candidate in the political deliberation.

When it comes to political finance, we can classify corruption under three different categories.¹⁵ There may be (a) *quid pro quo* corruption, (b) dependence and (c)

¹⁴ *Animal Defenders International v United Kingdom* (2013) 203, paras 111.

¹⁵ The term 'political finance' includes both party funding and campaign finance, since it refers to 'disclosure, transparency, expenditure and contribution limits, as well as direct forms of public subsidies to parties and candidates'. See, eg, Herbert E Alexander and Joel Federman, *Comparative Political Finance in the 1980s* (Advances in Political Science, Cambridge University Press 1989) 1. See also Timothy K Kuhner, 'The Corruption of Liberal and Social Democracies' (2016) 84 Fordham Law Review 2453 2456.

‘war chest’ corruption, as the majority of the High Court of Australia (the highest court in the Australian judicial system) defined in *McCloy v New South Wales*.¹⁶

Quid pro quo corruption is when a candidate bargains ‘with a wealthy donor to exercise his or her power in office for the benefit of the donor in return for financial assistance with the election campaign’.¹⁷ In other words, there is an *illicit agreement* that involves a donation by a wealthy donor and a subsequent (or previous) political benefit granted by the office-holder.

Dependence corruption, in turn, is subtler. ‘It arises from an office-holder’s dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest’.¹⁸ This argument assumes that politicians are frequently trapped by a repetition game — since many politicians want to get re-elected, or run for another office in the future, they will need money again in order to have a more competitive candidacy. As a result, this *dependence* on business donations or independent expenditures will constrain the politician while in office: he will think twice before taking a decision that will displease business interests, or he will give the

¹⁶ [2015] HCA 34.

¹⁷ *Buckley v Valeo*, 424 US 1, 26–27 (1976); *McCutcheon v Federal Election Commission*, 138 L Ed 2d 468, 485, 495–498 (2014).

¹⁸ *McCloy v New South Wales* at 47 [36]. In fact, the judges of the High Court of Australia have used the term *clientelism* to describe the phenomenon of dependence. However, *clientelism* has traditionally meant another thing within the social science scholarship on Brazilian politics: the term has been used to describe the situation in which a politician provides a *personal favour* to a voter (such as a public service, jobs and tax exceptions) in exchange for his *vote*. More broadly, *clientelism* has also been used to express the exchange of favours between politicians of different powers in Brazil: for instance, when a president of the republic grants a personal political favour to a federal deputy, in exchange for his political support. See Scott Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil* (Stanford University Press 1999) 177. See also José Murilo de Carvalho, ‘Mandonismo, Coronelismo, Clientelismo: Uma Discussão Conceitual’ (1997) 40 *Dados*. Thus, within the Brazilian context, the term has always expressed inequality of powers where a politician is the most powerful actor in the relationship — eg, the politician who grants the favour is clearly more powerful than the other party, be it a less powerful politician or voter — which is quite different from the way the Australian judges have used the term. Since this thesis deals mainly with the Brazilian scenario, I will, therefore, use the term ‘dependence corruption’ to express the phenomenon described by the majority of the High Court of Australia. Lawrence Lessig uses the term ‘dependence corruption’ in a similar way as it is used in this thesis. Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (1st edn, Twelve 2011).

donor privileged access to his decision-making on a given topic.¹⁹ A similar argument is that it might be ‘human’ to feel grateful to those who helped you to achieve a goal. A politician’s behaviour would thus be influenced by a psychological sense of gratitude towards the business that donated him money or made expenditures in his favour. The official, the argument follows, may grant privileged access to the financial supporter because of that sentiment.²⁰

It should be noted that, as with *quid pro quo* corruption, *dependence* corruption also relates to the lack of integrity of the elected politician’s attitude. But, because dependence corruption is centred on the *dependence* of the politician on a wealthy patron, it ‘is neither easily detected nor practical to criminalise.’²¹

Finally, there is *war chest corruption*,²² which attempts directly against political equality between parties and their candidates. It occurs when the volume of wealthy donations is so pronounced that distorts electoral competition, favouring parties and candidates aligned with business interests. Business-friendly candidates who are heavily funded by corporations will have more money to pay for the creation of media content, transportation, staff, and so forth. Similarly, corporations and businessmen may make overwhelmingly large independent expenditures favouring certain parties and candidates. As a consequence, there is an imbalance in public debate (that is, a predominant influence in the flow of political communication) and ‘a threat to the electoral process itself’.²³ Within this kind of corruption, sometimes lobbying may not

¹⁹ As put by Keith Ewing, ‘even if the donation does not directly secure policy changes or other benefits for the donor in these systems, such *access in itself* may help to put the donor in an *unrivalled position* when a decision is taken’ (emphasis added). Keith D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart 2007) 24.

²⁰ For a similar argument, see Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*, 114.

²¹ *McConnell v Federal Election Commission*, 540 US 93, 153 (2003). In this way, we never really know if a corporate donation was the sole factor that formed the official’s opinion.

²² *McCloy v New South Wales* at 47 [38].

²³ *Ibid*, citing *Federal Election Commission v Beaumont* 539 US 146, 154–155 (2003).

even be necessary since the politician's ideology would already be aligned with business interests.

1.2.2.2. The media

We have just seen that companies can *spend* financial resources to influence elections. There is, however, a very special business sector that influences the democratic debate because of its core business: *the media*. Media companies influence the political debate not because they spend financial resources in the terms discussed above, but rather because their core business is related to mass communication. They maintain an active and informed citizenry, and divulge information and ideas.²⁴ Therefore, media companies 'are particularly well positioned to exert undue influence on the political debate'²⁵ having a vital role in elections. The term media has usually meant the *traditional media*: that is, broadcast corporations and the press. However, the *new media* also plays an important role in political deliberation: that is, internet corporations, such as Google and Facebook, who do not focus on the production of content, but have the power to organise news and information that appear on their online platforms.

Recently, another category of mass communication corporation has emerged: those related to *behavioural research* through big data. The year of 2015 has shown that elections can be impacted by technology companies whose aim is to *change the behaviour of large groups*, such as the company SCL (Strategic Communication

²⁴ Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge University Press 2010) 174.

²⁵ David Cole, 'First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance' (1991) 9 Yale Law & Policy Review 236 268.

Laboratories) Group and its affiliate, Cambridge Analytica.²⁶ Press accounts report that these companies have worked for the Brexit campaign in the UK and for the Donald Trump campaign in the US.²⁷ According to Emma Briant, these companies aim to model mass populations and then change people's beliefs.²⁸ However, this phenomenon is too recent for a solid analysis: we do not have enough evidence to define how effective these companies have really been²⁹ and there are questions about their legality.

1.2.2.3. The soft expenses

Corporations and business elites from *all economic sectors* also can foster the creation and dissemination of information. For instance, they can publish opinion reports about governmental policies.

Moreover, corporations and businessmen from all economic sectors may help to disseminate information that they do not create: they may fund academic scholars, universities and think-tanks.³⁰ As the degree to which business controls the disclosure of information, there are at least four different possible interactions between business and

²⁶ Frances Stead Sellers, 'Cruz campaign paid \$750,000 to 'psychographic profiling' company' *The Washington Post* (19 October 2015) <https://www.washingtonpost.com/politics/cruz-campaign-paid-750000-to-psychographic-profiling-company/2015/10/19/6c83e508-743f-11e5-9cbb-790369643cf9_story.html?utm_term=.c2cdf1311e88> accessed 19 March 2017.

²⁷ Carole Cadwalladr, 'Robert Mercer: the big data billionaire waging war on mainstream media' *The Observer* (26 February 2017) <<https://www.theguardian.com/politics/2017/feb/26/robert-mercere-breitbart-war-on-media-steve-bannon-donald-trump-nigel-farage>> accessed 19 March 2017.

²⁸ Ibid.

²⁹ Editorial, 'The Guardian view on big data: the danger is less democracy' *The Guardian* (26 February 2017) <<https://www.theguardian.com/commentisfree/2017/feb/26/the-guardian-view-on-big-data-the-danger-is-less-democracy>> accessed 19 March 2017. Martin Robbins, 'The myth that British data scientists won the election for Trump' *Little Atoms* (30 January 2017) <<http://littleatoms.com/news-science/donald-trump-didnt-win-election-through-facebook>> accessed 19 March 2017.

³⁰ These think-tanks may include institutes founded by political leaders — such as former presidents and prime ministers. For example, many corporations have funded institutes of former presidents of Brazil (eg, the Institutes of Fernando Henrique Cardoso and Lula) and of the United States (eg, the Institutes of Bill Clinton and George W Bush). These institutes frequently produce conferences, seminars, policy reports and so on.

academia/think-tanks. Firstly, companies may hire consultations of academic scholars in order to inform a particular issue. For example, in Brazil, corporations often hire legal scholars to write an opinion about a specific issue so they can present it to the court in a given case.³¹ In this case, corporations control the dissemination of information.

The second category of interaction is when companies have financial links with specific scholars, whose research has been ideologically aligned with business interests on a given topic. For instance, press accounts report that many of the scholars who testified in congressional hearings about the Dodd-Frank Wall Street Reform and Consumer Protection Act had a professional link with financial institutions at the moment they were heard.³² Although companies might not have controlled what the scholars said, apparently their interests were ideologically aligned.

A third category would be donations to a university department. For example, the King's College London School of Law received a gift of £20 million from Mr Dickson Poon, who owns a British department store chain. This gift was part of an investment strategy to establish the 'School of Law as a leader in the field of transnational law'.³³ Although it can be argued that Mr Dickson Poon has a general interest in transnational law because his company benefits from globalisation, he does

³¹ A similar situation happens when a company funds the empirical research of academic scholars but controls what will be published. For example, an association of banks may hire a scholar or a group of scholars to research the mental wellness of the banks' employees vis-à-vis the rest of the population; and insert a clause in the financing agreement that the academic scholars can only publish the results in case the banks' employees have equal or less mental diseases than the rest of the population. In this case, therefore, the banks control the disclosure of the research results. Letting the scholars publish results saying the contrary — ie, the banks' employees have more mental illness than the rest of the population — could lead banks to spend more on the health of their employees.

³² Some academics were, for example, members of the board of a financial company, according to some reports. Lee Fang, 'The Scholars Who Shill for Wall Street' *The Nation* (23 October 2013) <<https://www.thenation.com/article/scholars-who-shill-wall-street/>> accessed 19 March 2017. See also Emily Flitter, Kristina Cooke and Pedro da Costa, 'Special Report: For some professors, disclosure is academic' *Reuters* (20 December 2010) <<http://www.reuters.com/article/us-academics-conflicts-idUSTRE6BJ3LF20101220>> accessed 19 March 2017.

³³ Katherine Barnes, '£40m investment programme for School of Law' *The Dickson Poon School of Law/News* (19 March 2012) <<http://www.kcl.ac.uk/newsevents/news/newsrecords/2012/03March/40m-investment-programme-for-School-of-Law.aspx>> accessed 19 March 2017.

not control the content of the teaching and research, and the content might even go against his interests.

Finally, a fourth category might be when a company funds research that appears to be against its interests in the short-term but brings long-term benefits. For example, a large brewery company might fund research on binge drinking, as a matter of marketing. The company does not control the dissemination of the results, and they may indeed work against the company's short-term interests. But the firm might enhance the value of its brand by being viewed as a 'socially responsible' brewery. This might give the company a better position to bargain future policies.³⁴

1.2.2.4. The influence of corporations over suppliers and the labour market

Corporations may enhance their lobbying power by staffing employees of and recruiting employees from the government. At least in theory, this *revolving door* may enable companies to influence government policies and law enforcement. However, as Teachout and Khan state, 'it is difficult to prove that ties to corporations or aspirations to work for them' shape any particular enforcement decision, 'as officials can always offer explanations for why they believe a certain choice advanced the public interest'.³⁵ Some scholars have argued that the influence might be subtle: non-rational forms — like

³⁴ Coen, Grant and Wilson, 'Political Science: Perspectives on Business and Government' 10.

³⁵ Zephyr Teachout and Lina Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9 Duke Journal of Constitutional Law & Public Policy 37 45. Teachout and Khan have made a literature review of the empirical research on that matter and found out that "at least one study has rebutted the idea that revolving door dynamics weaken SEC regulation. Some people even argue that the desire to join private practice actually incentivises tough enforcement, which can raise one's profile and showcase one's expertise".

identity, status, and relationships — could end up shaping policy according to corporate interests.³⁶

Big firms may also try to influence their suppliers' political choices, especially in monopsony or oligopsony situations (when there is just one or few buyers but many sellers). Teachout and Khan noted that large food processing companies have constrained the political voice of their small and medium-sized suppliers (for example, chicken farmers). In 2009, the Obama administration began to measure the state of consolidation in agricultural markets. The Attorney General Eric Holder and Agriculture Secretary Tom Vilsack travelled around the country to hear directly from farmers about the conditions they faced. However, there are reports that in the days before the poultry hearing in Alabama, representatives from Tyson and Pilgrim's Pride visited farmers to threaten them: if they spoke out at the hearing they would face retaliation. As a consequence, reportedly many farmers did not show up, or were afraid of speaking up because of said threats. Thus, arguably, 'for many farmers, their economic dependence lost them their right to free speech and assembly'.³⁷ Similarly, corporations may try to influence their employees' political choices, such as their votes in elections, in more or less subtle ways.

1.3. The scope of the thesis

This thesis will focus on elections, with a particular emphasis on political finance, though there will be important discussions on the role of the media. Problems such as the privileged position of companies in capitalist democracies will be discussed

³⁶ Ibid. In addition, Gregory Shaffer argues that companies' great financial resources also may help them "to attract the best lawyers to gather evidence and put forward legal arguments" when it comes to litigation. Shaffer, 'Law and Business' 6. He also claims that the ability of companies to "impose costs on the opponent and the capability of absorbing costs" may affect how the law operates. For discussion and references, see *ibid* 8.

³⁷ Teachout and Khan, 'Market Structure and Political Law: A Taxonomy of Power' 51.

just briefly in some parts of the thesis. I will not focus on the influence of corporations over suppliers and the labour market; nor will I discuss corporate soft expenses.

Since this thesis will focus on political finance, it will focus on business influence over the *legislative and executive branches* of government — including an independent government agency. The influence of companies and businessmen over the *judiciary*, though important, is beyond the scope of this thesis.

Brazil will be the country in focus. Between the 1994 and 2014 federal elections, corporate donations dominated the main financial resources of parties and candidates. To illustrate, corporate donations accounted for 74% of Brazilian political party and candidate funding in the 2010 general election,³⁸ and 76% in 2014.³⁹ For many, including the majority of the Supreme Court in the *ADI 4650* case heard in 2015, war chest and dependence corruption apparently occurred in Brazil.

The Constitution of 1988 structures the *Brazilian capitalist democracy*.⁴⁰ Already in article 1, the Constitution establishes that Brazil is a ‘legal democratic state’, founded on ‘citizenship’ and ‘political pluralism’, among other values. The democratic feature of the Brazilian state is further reinforced by the Constitution several times throughout its text.⁴¹

The country’s capitalism, in turn, is first referred to at item IV of article 1, which establishes that the Brazilian legal state is founded on the social value of *free enterprise*. Moreover, the Constitution’s article 170 establishes that the economic order is based on

³⁸ STF, ADI 4650/DF, Rel Min Luiz Fux, DJ 04/03/2016. Min Dias Toffoli, Inteiro Teor do Acórdão 89.

³⁹ Bruno Carazza, *Dinheiro, Eleições e Poder: As Engrenagens do Sistema Político Brasileiro* (Companhia das Letras 2018) 43.

⁴⁰ Constituição da República Federativa do Brasil, Brasília, DF: Senado Federal, DOU 5/10/1988. For an official translation of the Constitution to English, see <<http://english.tse.jus.br/arquivos/federal-constitution>> accessed 17 February 2017.

⁴¹ See, eg, articles 17, 24 and 34. For an analysis of the constitutional provisions that structure capitalism in Brazil, see, eg, Celso Antonio Bandeira de Mello, *Curso de Direito Administrativo* (Malheiros 2009) 788.

the principles of ‘private property’ and ‘free competition’, among others. Structured by the 1988 Constitution and by infra-constitutional legislation enacted in the 1990s,⁴² the Brazilian state is essentially a regulator of a liberal economy, though the government may occasionally implement industrial policies to foster certain industries (as the Workers’ Party administrations did).⁴³

Infra-constitutional legislation regulates individual’s political donations (Laws n 9096/1995 and 9504/1997).⁴⁴ Donations by corporations were allowed from the 1994 to 2014 federal elections (the Brazilian Supreme Court then ruled in 2015 that they violate the Constitution in the country’s context).⁴⁵ While companies and businessmen have been donating individually for the most part,⁴⁶ lobbying is considered to be hybrid. Corporations and businessmen may lobby both individually and through business confederations, state federations and associations.⁴⁷ Lobbying remains unregulated by legislation, however.

In short, it is reasonable to assume that Brazilian business operates upon a plural structure. That is, that business sectors compete with other groups of society (workers, environmentalists, non-profit organisations, and so forth) for political influence.⁴⁸ However, this thesis will assume that companies and businessmen have a privileged

⁴² See, eg, the Competition Act 1994 (Lei n° 8884, de 11 de junho de 1994, DOU 13/6/1994), the Brazilian Consumer Protection Code (Lei n° 8078, de 11 de setembro de 1990, DOU 12/09/1990), the Antidumping Law (Lei n° 9019, de 30 de março de 1995, DOU 31/03/1995).

⁴³ Historically, the country’s capitalism was characterised by developmentalist economic policies implemented by the government. But the country’s capitalism shifted to a liberal economy after the 1990s. When the Workers’ Party took office, in 2003, it combined the current liberal economic structure with some developmentalist policies, such as the ones destined to foster ‘national champions’ (ie, the state- owned Brazilian Development Bank/BNDES have provided lower interest loans for favoured companies, in order to assist them to compete internationally). It should be noted that some of these companies were large political donors — as will be addressed in chapter eight.

⁴⁴ Lei n° 9096, de 19 de setembro de 1995, DOU 20/9/1995 (Political Parties Act 1995). Lei n° 9504, de 30 de setembro de 1997, DOU 01/10/1997 (Elections Act 1997).

⁴⁵ STF, ADI 4650/DF.

⁴⁶ For exceptions to the rule, see section 3.4.

⁴⁷ Manoel Leonardo Santos, ‘O Parlamento sob Influência: O Lobby da Indústria na Câmara dos Deputados’ (Tese de Doutorado em Ciência Política, Universidade Federal de Pernambuco 2011) 83.

⁴⁸ Surely, there may also exist competition between economic sectors, corporations and businessmen.

structural position in the plural channels of the Brazilian capitalist democracy. It will further assume that companies and businessmen tend to have greater economic resources than other groups and individuals, and that they frequently spend these resources in order to influence the government.⁴⁹

Moreover, I should highlight that I will focus more on the non-criminal forms of political finance corruption (dependence and war chest) than the criminal one (*quid pro quo*). There are three main reasons for this. Firstly, in my view, *quid pro quo* corruption is just one part of the problem. Relying on decisions from the Supreme Court (not only the Brazilian one, but also those of other countries, such as Canada) that will be discussed in chapter four, this thesis will assume that dependence and war chest corruption are as disturbing as *quid pro quo*: they all harm people's trust in democracy, in one way or another. In this sense, it is no coincidence that, by protecting the electoral process from dependence and war chest corruption, we also help to protect it from *quid pro quo* corruption, as it will be argued in Part C of the thesis. Secondly, since this thesis relies on an electoral law approach, it can better contribute to academic debate by discussing how the *quid pro quo* cases fit into the whole context. Criminal lawyers are better trained to discuss, in a comprehensive way, the implications of *quid pro quo* cases and the material proof that those cases require.⁵⁰ Thirdly, although relevant *quid pro quo* criminal cases have emerged in Brazil in the last years, many of them are still ongoing cases, which hinders proper academic analysis. Thus, we lack the proper temporal

⁴⁹ These assumptions align the descriptive and empirical parts of the thesis (parts A and B) with the neo-pluralist account of democracy in political theory. For a description of this school of thought, see David Held, *Models of Democracy* (2 edn, Polity 1996) 214. Some of the most well-known works associated with neo-pluralism are Charles Lindblom's *Politics and Markets: The World's Political-Economic Systems* and Robert Dahl's later publications, particularly *A Preface to Economic Democracy* (University of California Press 1986). My view is that the neo-pluralist approach best describes the current Brazilian reality. However, in the last part of the thesis (Part C) I argue that, according to the Constitution, the Brazilian society should aim the ideal democratic legitimacy from the Rawlsian point of view and, as such, I propose reforms.

⁵⁰ In this way, this thesis does not draw any conclusions about the involvement of any person in *quid pro quo* corruption, or if a given public officer has committed any kind of wrongdoing.

distance to completely rely on them; they should be part of an analysis of the whole political finance context. It is in this vein that the recent *quid pro quo* cases will be addressed in chapters six and eight. In other words, they will be addressed, but from the broader perspective of political finance corruption in general.

The thesis has three main questions. Firstly, it asks how the Brazilian law of democracy is framed, with a focus on political finance.

Businesses make political donations to have more political influence. One of the issues that businesses may seek to influence is antitrust legislation and its enforcement. Therefore, the thesis' second main question is what were the implications, if any, of the political finance system based on corporate donations for the appearance of the democratic integrity of antitrust law.

Finally, the question that then arises is how the law of democracy should be framed in order to promote the appearance of electoral integrity.

1.4. The map of the thesis

Therefore, to answer those questions, the thesis is organised into three parts. Part A addresses the Brazilian law of democracy, by which I mean the main norms that structure Brazilian democracy, with an emphasis on political finance legislation. Part B addresses one of the possible effects of this structure. Part C proposes a reform for this structure.

The objectives of each chapter (and the methods implemented to meet them) will be explored in detail within each chapter,⁵¹ but the thesis is structured as follows:

⁵¹ The academic literature relevant to each chapter will also be duly considered in the course of each chapter.

Part A

In Part A, before seeing how they are financed, we will see *who* the Brazilian parties are (party system), *where* they compete (electoral system), *what* they compete for (system of government) and how this political competition is covered by the media (media system). This is the task of chapter two, which also tries to explain why money might be important for Brazilian politicians.

After the groundwork laid down by chapter two, chapter three presents an overview of political finance legislation in Brazil. It discusses the political finance system based on corporate donations that was in force between the 1994 and 2014 elections. This chapter further elaborates how the system shifted to the current one based on mixed resources.

Part B

Part B of the thesis investigates, through case studies, what were the implications, if any, of the political finance system based on corporate donation, for another branch of law: antitrust. It explores, more precisely, if there were any consequences to the appearance of democratic integrity of antitrust law. These case studies remain topical because, although corporate donations are now banned, there are discussions as to whether they should be re-introduced.⁵²

⁵² Considering that political finance laws are never-ending and generate permanent debates, some politicians and judges have been arguing that corporate donations should be re-introduced to the Brazilian political finance system. See, eg, Igor Gadelha and Felipe Frazão, 'Lideranças do PP, PSDB e PSD saem em defesa da doação empresarial de campanha' *O Estado de S. Paulo* (16 August 2017) <<https://politica.estadao.com.br/noticias/geral,liderancas-do-pp-psdb-e-psd-saem-em-defesa-da-doacao-empresarial-de-campanha,70001938801>> 11 June 2018; Laryssa Borges, 'Gilmar Mendes: proibição a doação empresarial pode ser revista' *Revista Veja* (23 August 2016)

Before exploring the practical implications in chapters five and six, chapter four articulates a theory for matters involving political finance corruption. To put it in a metaphorical manner, chapter four offers the lenses that we shall use when reading the more empirical chapters five and six. By discussing the importance of people's trust in elections to the perpetuation of representative democracy, chapter four tries to explain why the *appearance* of political finance corruption might be sufficient as a justification for a reform of the legislation.

Chapter five then investigates whether campaign finance has impacted Brazil's antitrust *legislation*, focusing on the legislative process of the Competition Act 2011,⁵³ more specifically on amendments that shaped the Act's text.

Chapter six, in turn, discusses whether corporate donations have affected *enforcement* of the antitrust legislation. It focuses mainly on the Brazilian competition agency, Cade (acronym in Portuguese for *Conselho Administrativo de Defesa Econômica*).

Part C

Part C suggests a reform of part of the Brazilian law of democracy in order to enhance people's trust in elections.

<<https://veja.abril.com.br/politica/proibicao-a-doacao-privada-pode-ser-revista-diz-gilmar-mendes/>> accessed 11 June 2018; Edson Sardinha, 'Gilmar Mendes e Maia articulam volta do financiamento eleitoral por empresas' *Congresso em Foco* (22 August 2017) <<https://congressoemfoco.uol.com.br/amp/noticias/gilmar-mendes-e-maia-articulam-volta-do-financiamento-eleitoral-por-empresas/>> accessed 11 June 2018. In the academia, see, eg, Bruno Carazza, 'Interesses Econômicos, Representação Política e Produção Legislativa no Brasil sob a Ótica do Financiamento de Campanhas Eleitorais' (Tese de Doutorado em Direito, Universidade Federal de Minas Gerais 2016) 159 <http://www.bibliotecadigital.ufmg.br/dspace/bitstream/handle/1843/BUOS-ASNHA2/bruno_carazza_tese_vers_o_para_defesa.pdf?sequence=1> accessed 1st August 2018.

⁵³ Lei n° 12529, de 30 de novembro de 2011, DOU 01/11/2011 e retificado em 02/12/2011. For an English version of the Act, see <<http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>> accessed 17 February 2017.

Chapter seven sets the theoretical foundations for a Rawlsian interpretation of the Brazilian Constitution and, taking into account the constitutional text, proposes a new paradigm for regulation: to control concentrations of political speech to foster the appearance of free formation of public opinion.

Chapter eight debates the consequences of this paradigm for political competition between non-candidate citizens and their groups — that is, those citizens who make a political donation or expenditure; or own media resources, particularly in the traditional media.

Finally, chapter nine discusses the implications of this paradigm for the competition between political parties and their candidates, focusing on their financial funding and access to the media.

Part A

The Brazilian law of democracy

Chapter Two

The Brazilian context

The discipline of campaign finance should consider not only the culture-historical circumstances of each country but also the characteristics related to the system of government, the party system, the electoral rules in general and the political practices.

Justice Gilmar Mendes, Brazilian Supreme Court, *ADI 4650*⁵⁴

2.1. Introduction

Before seeing how political parties are financed, we must see *who* they are, *where* they compete, *what* they compete for, and how this competition is covered by the media.

Thus, this chapter is organised as follows: the first section will cover the party system, while the second and third sections will respectively focus on the system of government and the electoral system. After looking at these systems, it will be possible to briefly address a controversy that takes place within the academic debate about

⁵⁴ Inteiro Teor do Acórdão 176. All speeches quoted in this thesis that were made originally in Portuguese or in Spanish and that were not translated by the original author, have been translated to English by me.

Brazilian parties: whether they are weak or strong. Finally, the last section will discuss the media system, since the media's coverage is central to political competition. All those sections will be mainly based on relevant legislation and on interdisciplinary literature to understand how the Brazilian context works in practice. I will not particularly investigate Brazilian cultural political practices because they will be addressed throughout the thesis.⁵⁵

The chapter will principally cover the New Republic period, which began in 1985 — that is, when a twenty-one-year-old authoritarian military rule fell and gave birth to the present democratic regime.

Hopefully, this will serve as a background chapter for the thesis and will give the reader a brief description of the Brazilian context.

2.2. The party system

Political parties are the 'bridge between government and society'.⁵⁶ It is through political parties that people organise themselves to compete in elections and occupy the political institutions of the state — and, once in power, pass legislation and implement the policies that govern society.⁵⁷ In Brazil, candidates are required to belong to a party to run for political office (article 14, paragraph 3, item V, of the Constitution of 1988).

⁵⁵ The three most commonly referenced Brazilian cultural practices are clientelism, patronage and patrimonialism. For clientelism, see footnote 18 in chapter one; for patronage, see footnote 74 in this chapter; and for patrimonialism see footnote 230 in chapter three.

⁵⁶ David French, 'Foreword' in Peter Burnell (ed), *Building Better Democracies: Why Political Parties Matter* (Westminster Foundation for Democracy 2004) 1.

⁵⁷ See Keith D Ewing, *The Funding of Political Parties in Britain* (Cambridge University Press 1987) 2.

Brazilian parties were suppressed several times throughout the country's history, which led to constant changes of party systems.⁵⁸

But, after the fall of the military dictatorship in 1985, a free multi-party system was established. Right after taking office that year, civilian president José Sarney and the Congress enacted the Constitutional Amendment n 25, which abolished all previous

⁵⁸ The first Brazilian parties, created at the beginning of the nineteenth century, were suppressed by the leaders of the 1889 coup which abolished the Monarchy and introduced the Republic. All parties from the First Brazilian Republic, in turn, were banned by president Getúlio Vargas in 1937, when he implemented an authoritarian regime. After 1945, mass political parties emerged in Brazil with the introduction of the Fourth Republic and its mass democracy. But they also had a short life: in a coup in 1964, the military took power and once again all parties were banned.

After taking office, the military enacted the Institutional Act n 2 and the Complementary Act n 4, which implemented a controlled two-party system. The two-party system was formed by the pro-government party National Renovating Alliance (ARENA), and the opposition Brazilian Democratic Movement (MDB) party, both artificially created by the military. Moreover, all elections for president and vice-president became indirect (article 9, Institutional Act n 2). Thus, by widely manipulating electoral laws to ensure the majority of the pro-military ARENA party and prevent the growth of opposition in Congress, the military were 'elected' several times for the Presidency, ruling the country for about twenty years. Ato Institucional n° 2, de 27 de outubro de 1965, DOU 27/10/1965, republicado em 28/10 e 05/11/1965. Ato Complementar n° 4, de 20 de novembro de 1965, DOU 22/11/1965.

The current multi-party system began to be formed in 1979. Worried by a close call at the 1978 elections, military strategists decided that the two-party system was no longer working to their advantage, and thus opted to divide and conquer the opposition by ordering a return to a multi-party system. Therefore, in 1979 the Law n 6683 was enacted, giving back political rights to those politicians and parliamentarians that had had their political rights suspended. That same year, the bipartisan system was ended by Law n 6767, enabling the creation of other opposition parties, such as the Workers' Party (PT). Lei n° 6683, de 28 de agosto de 1979, DOU 28/8/1979. Lei n° 6767, de 20 de dezembro de 1979, DOU 20/12/1979.

In sum, the party system changed in all political transitions, since the Imperial period: it changed from the two-party format of the Empire; to the one-party per state of the First Republic; to the considerable flux of parties, with no crystallisation of a defined party structure in the early years of the Vargas Era; to the no-party state of Vargas' *Estado Novo*; to the incipient three-party system of the Fourth Republic; to the artificially created two-party system of the military dictatorship; to the strictly controlled party system of the military regime after 1979; and, finally, to the current free multi-party system that has been developing since 1985.

For a historical analysis about the Brazilian parties and its constant suppressions, see Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil*. Afonso Arinos de Melo Franco, *História e Teoria dos Partidos Políticos no Brasil* (Editora Alfa-Omega 1974). For the manipulation of election legislation by the military, see Timothy J Power, *The Political Right in Postauthoritarian Brazil: Elites, Institutions, and Democratization* (Pennsylvania State University Press 2000) 63. Eli Diniz, 'O Ciclo Autoritário: A Lógica Partidário-Eleitoral e a Erosão do Regime' in Olavo Brasil Junior de Lima (ed), *O Balanço do Poder* (IUPERJ: Rio Fundo Editora 1990). Bolívar Lamounier and Rachel Meneguello, *Political Parties and Democratic Consolidation: The Brazilian Case* (Latin American Program, the Wilson Center 1985) 22.

restrictions on the creation of parties and legalised outlawed Marxist parties.⁵⁹ Perhaps more importantly, a new Constitution was enacted in 1988, reinforcing that the creation of political parties is now free, and stating that parties have the autonomy to define their internal structure, organisation and operation, with a few conditions, such as a required ‘national character’.⁶⁰ Moreover, in 1995, the current Political Parties Act was enacted, confirming that parties are now legal entities of private law (and not of public law, as previously).⁶¹ These have been the parties’ legal basis of the existing democratic regime.

In the current multi-party system, 35 political parties have obtained official registration,⁶² and around 26 were successful in obtaining representation in the Congress during the last legislature (that is, the 55th).⁶³ Brazil has arguably been a world leader in the number of parties⁶⁴ and in the fragmentation of Congress.⁶⁵

The three most important Brazilian parties in the New Republic have traditionally been the centrist Brazilian Democratic Movement, the centre-right Brazilian Social Democratic Party and the centre-left Workers’ Party. In the 2018 elections, the Social Liberal Party emerged as part of the rise of the world-wide new populist right-wing movement.

⁵⁹ Emenda Constitucional nº 25, de 15 de maio de 1985, DOU 16/5/1985. For a more detailed account of the transition from the military dictatorship to the current democratic regime, see Power, *The Political Right in Postauthoritarian Brazil: Elites, Institutions, and Democratization*, 69.

⁶⁰ Artigo 17 da Constituição da República Federativa do Brasil, 1988.

⁶¹ Lei nº 9096/1995. For a brief discussion about the evolution of legislation that has composed the parties’ legal framework, see, eg, Rogerio Schmitt, *Partidos Políticos no Brasil (1945–2000)* (Jorge Zahar 2000) 64. A possible explanation for this shift is that parties saw the need to protect themselves from the abusive interference of the state, considering the occurrence of the military authoritarian regime from 1964 to 1985, when the regime abusively manipulated the party system.

⁶² TSE (Tribunal Superior Eleitoral), ‘Partidos políticos registrados no TSE’ <<http://www.tse.jus.br/partidos/partidos-politicos/registrados-no-tse>> accessed 11 June 2018.

⁶³ The 55th legislature met from 1st February 2015 to 31st January 2019. Senado Federal, ‘Senadores’ <<https://www12.senado.leg.br/noticias/tablet/senadoresporpartido>> accessed 11 June 2018. Câmara dos Deputados <<http://www.camara.leg.br/Internet/Deputado/bancada.asp>> accessed 11 June 2018.

⁶⁴ Barry Ames, Andy Baker and Lucio R Rennó, ‘The Quality of Elections in Brazil: Policy, Performance, Pageantry, or Pork?’ in Peter R Kingstone and Timothy J Power (eds), *Democratic Brazil Revisited* (University of Pittsburgh 2008) 109.

⁶⁵ Marcus André Melo ‘O queijo suíço’ *Folha de S. Paulo* (15 October 2018) <<https://www1.folha.uol.com.br/colunas/marcus-melo/2018/10/o-queijo-suico.shtml>> accessed 06 January 2019.

2.2.1. The Brazilian Democratic Movement

The Brazilian Democratic Movement (mostly known as ‘MDB’, acronym in Portuguese for *Movimento Democrático Brasileiro*) was the largest party in the Senate, and the second largest in the Chamber of Deputies in the last legislature.⁶⁶ It is a *centrist heterogeneous catch-all* party⁶⁷ and, most frequently, lacks a unified party program and ideology.

The MDB was founded in 1967 as the opposition party of the first round of the military dictatorship.

But, after the decline of the military authoritarian regime, the MDB changed its *opposition party* feature, to transform itself into arguably the ‘most opportunistic and internally diverse of Brazilian parties’.⁶⁸ The party is often divided between government and opposition supporters, as its members range from the centre-right to the centre-left of the political spectrum.

Due to the large size of its delegation and its members’ flexibility on programmatic matters, the MDB is often sought out as a governing ally.⁶⁹ Indeed, since the inauguration of the New Republic, the party has remained in the executive, in one way or another. The only administration that MDB did not join was Fernando Collor’s in 1990, but he was impeached less than two years after taking office.⁷⁰

⁶⁶ UOL Eleições, ‘O mapa completo de quem vai fazer as leis do Brasil’ <<http://eleicoes.uol.com.br/2014/raio-x/1-turno/congresso#capa>> accessed 8 August 2017. The intention of mentioning the ranking above is only to give an idea of the size of the party. Some congressmen have changed party affiliations after taking office.

⁶⁷ Wendy Hunter, ‘The Partido dos Trabalhadores: Still a Left Party?’ in Peter R Kingstone and Timothy J Power (eds), *Democratic Brazil Revisited* (University of Pittsburgh Press 2008) 22.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Following Collor’s impeachment, the idea that it is considerably more difficult for a Brazilian president to govern without the support of a large majority in Congress gained strength. See Marcus Andre de Melo and Carlos Pereira, *Making Brazil Work: Checking the President in a Multiparty System* (Studies of the Americas, 1 edn, Palgrave Macmillan 2013) 159. In this sense, it is quite

2.2.2. The Brazilian Social Democratic Party

The Brazilian Social Democratic Party (mostly known as 'PSDB', acronym in Portuguese for *Partido da Social Democracia Brasileira*) is a *centre-right* party, which was the third largest party in the Senate and the Chamber of Deputies in the 55th legislature.⁷¹

The PSDB won the presidential elections in 1994 and 1998, with Fernando Henrique Cardoso, and was the Workers' Party main competitor at the presidential elections until 2014.

The party was founded in 1988, by experienced politicians who broke away from the MDB.⁷² The founders of the PSDB were dissatisfied with some of the MDB's political decisions,⁷³ including the 'naked patronage politics' of the Sarney administration at the time.⁷⁴

In the beginning, the PSDB was considered a 'social democratic' defection from the MDB and acquired a centre-left reputation. But this changed around 1994 when Cardoso won the presidential election: the party shifted to the centre-right.⁷⁵ The

problematic for presidents to govern effectively without the support of the largest delegation in Congress, which has frequently been the MDB's. Marcos Nobre, *Imobilismo em Movimento: Da Abertura Democrática ao Governo Dilma* (Companhia das Letras 2013) 12, 55. Therefore, the MDB became a synonym of governance, similar to what the old Social Democratic Party was during the Fourth Republic (1945–64).

⁷¹ UOL *Eleições*, 'O mapa completo de quem vai fazer as leis do Brasil'.

⁷² Hunter, 'The Partido dos Trabalhadores: Still a Left Party?' 22.

⁷³ Celso Roma, 'A institucionalização do PSDB entre 1988 e 1999' (2002) 17 *Revista Brasileira de Ciências Sociais* 71.

⁷⁴ Power, *The Political Right in Postauthoritarian Brazil: Elites, Institutions, and Democratization*, 197. Patronage is 'the power or right to control appointments to public office or the right to privileges'. 'patronage, n' (*OED Online*, OUP 2018) <<http://www.oed.com/view/Entry/138931?rskey=CmM3Xa&result=1&isAdvanced=false#eid>> accessed 21 July 2018.

⁷⁵ See, eg, Hunter, 'The Partido dos Trabalhadores: Still a Left Party?' 22.

ideological shift of the PSDB was documented by empirical studies, such as one made by Timothy Power.⁷⁶

Since its foundation, PSDB adhered (for the most part) to programmatic politics.⁷⁷

2.2.3. The Workers' Party

The Workers' Party (mostly known as 'PT', acronym in Portuguese for *Partido dos Trabalhadores*) is a *centre-left* party. It was the second largest party in the Senate, and the first in the Chamber of Deputies in the last legislature.⁷⁸

The party won the 2002, 2006, 2010 and 2014 presidential elections. The first two were won by Luiz Inácio Lula da Silva, and the others by Dilma Rousseff.

The PT is a rare case of a party that was created bottom-up (that is, outside the parliamentary/state institutions in Brazil).⁷⁹ It was founded in 1980 by union members,⁸⁰ social movements, intellectuals, the progressive wing of the Catholic Church, and other opponents of the military regime.⁸¹

⁷⁶ Timothy J Power, 'Centering Democracy? Ideological Cleavages and Convergence in the Brazilian Political Class' in Peter Kingstone and Timothy Power (eds), *Democratic Brazil Revisited* (University of Pittsburgh 2008) 89.

⁷⁷ Hunter, 'The Partido dos Trabalhadores: Still a Left Party?' 22. In other words, the party has been fairly relying on a party programme with clear policy proposals.

⁷⁸ *UOL Eleições*, 'O mapa completo de quem vai fazer as leis do Brasil'.

⁷⁹ Schmitt, *Partidos Políticos no Brasil (1945–2000)*, 49. See also Benedito Tadeu César, *PT: A Contemporaneidade Possível: Base Social e Projeto Político (1980–1991)* (Editora da Universidade Federal do Rio Grande do Sul 2002) 372.

⁸⁰ The union members linked to PT claimed that the unions linked to the old Brazilian Labour Party (PTB) — emerged in 1945 in connection with Getulio Vargas — were co-opted by the government. See Bernardo Kucinski, 'The Rise of the Worker's Party' in Sue Branford, Bernardo Kucinski and Hilary Wainwright (eds), *Politics Transformed: Lula and the Workers' Party in Brazil* (Latin America Bureau 2003) 23.

⁸¹ *Ibid* 24. See also Kathryn Hochstetler, 'Organized Civil Society in Lula's Brazil' in Peter Kingstone and Timothy Power (eds), *Democratic Brazil Revisited* (University of Pittsburgh 2008) 33.

Although it emerged as a hard-left party, the PT started to moderate its policy proposals during the 2002 presidential campaign,⁸² and now is considered a centre-left party.⁸³

2.2.4. The Social Liberal Party

In the 2018, the presidential election was won by the far-right populist Jair Bolsonaro, from the Social Liberal Party (mostly known as 'PSL', acronym in Portuguese for *Partido Social Liberal*). It was the first time since 1994 that the presidential election was won by a party that was neither the PT nor the PSDB. Benefiting from an atypical presidential election — boosted by the Car Wash and other *quid pro quo* corruption scandals, and a knife attack that threatened his life during the campaign⁸⁴ –, Bolsonaro won the second round against the PT's candidate, Fernando Haddad.

The victory of the Brazilian version of the fresh worldwide populist right-wing movement was consolidated with an unusual performance in the elections for the Chamber of Deputies too, where the PSL got the second largest number of seats, closely

⁸² See Wendy Hunter, *The Transformation of the Workers' Party in Brazil, 1989–2009* (Cambridge University Press 2010) 144. The PT's ideological shift is symbolised by the publishing of the *Carta ao Povo Brasileiro* during the 2002 presidential elections. André Singer, 'A Segunda Alma do Partido dos Trabalhadores' (2010) *Novos Estudos CEBRAP* 89. The *Carta* was a manifesto in which Lula, the PT's presidential candidate, promised to maintain the economic strategy that was being developed by his predecessor, the centre-right Fernando Henrique Cardoso, from the PSDB. See Benjamin Goldfrank and Brian Wampler, 'From Good Government to Politics as Usual: The Rise and Possible Demise of the Workers' Party' in Peter Kingstone and Timothy J Power (eds), *Democratic Brazil Divided* (University of Pittsburgh Press 2017).

⁸³ Power, 'Centering Democracy? Ideological Cleavages and Convergence in the Brazilian Political Class' 90.

⁸⁴ Dom Phillips, 'Jair Bolsonaro stabbing: knife attack plunges Brazil's election into disarray' *The Guardian* (7 September 2018) <<https://www.theguardian.com/world/2018/sep/07/jair-bolsonaro-brazil-stabbing-knife-attack-election>> accessed 3 November 2018. Ernesto Londoño and Shasta Darlington, 'Jair Bolsonaro, Presidential Candidate in Brazil, Is Stabbed' *The New York Times* (6 September 2018) <<https://www.nytimes.com/2018/09/06/world/americas/brazil-jair-bolsonaro.html>> accessed 3 November 2018.

lagging behind the PT.⁸⁵ However, the PSL's performance was less impressive in the elections for the Senate, where the party won only the 10th largest number of seats.⁸⁶

2.2.5. Other political parties

Because Brazil has had a quite fragmented Congress during the New Republic period, there are other parties that frequently compose the government coalition. For example, the conservative Democrats (DEM) and the Progressive Party (PP), which are successors of the ARENA party, who backed the military regime; the centre-left Brazilian Socialist Party (PSB) and Democratic Labor Party (PDT); and other smaller parties.

2.3. The system of government

Now we will take a look at what political parties compete for.

Brazil has a coalition-based presidential system, which developed after the country's redemocratisation in 1985.⁸⁷

The federal political bodies are composed of the Presidency of the Republic, which is the executive power;⁸⁸ and the Congress, which is the legislative power. The

⁸⁵ Jairo Nicolau, 'O triunfo do Bolsonarismo: como os eleitores criaram o maior partido de extrema direita da história do país' *Revista Piauí* (November 2018) <<https://piaui.folha.uol.com.br/materia/o-triunfo-do-bolsonarismo/>> accessed 15 December 2018.

⁸⁶ *Agência Senado*, 'Composição do Senado salta de 15 para 21 partidos em 2019' (3 January 2019) <<https://www12.senado.leg.br/noticias/materias/2019/01/03/composicao-do-senado-salta-de-15-para-21-partidos-em-2019>> accessed 21 January 2019.

⁸⁷ The term coalition-based presidential system (*presidencialismo de coalizão*, in Portuguese) was first coined by Sérgio Abranches, 'Presidencialismo de Coalizão: O Dilema Institucional Brasileiro' (1988) 31 *Dados* 5 122.

⁸⁸ Constituição da República Federativa do Brasil, 1988, artigo 76.

Congress, in turn, is divided between a lower house (the Chamber of Deputies) and an upper house (the Senate).⁸⁹ The Chamber has 513 seats,⁹⁰ while the Senate has 81.⁹¹

Those willing to pursue the Presidency of the Republic have two problems from the start: they need time on television to compete more effectively during the elections, and it is unlikely that their parties will have a majority in Congress.⁹²

Consequently, presidential candidates are stimulated to settle coalitions that go beyond their own parties in order to have the greatest time on television possible (the legislation grants access to television to all Brazilian parties during elections⁹³ and presidential candidates can use the sum of the time assigned to the six largest parties of their coalitions⁹⁴) and to be able to pass laws in case they get elected.

Presidential candidates use patronage to forge political support. By offering a place in the cabinet (such as appointing an MDB politician to the Ministry of Tourism⁹⁵), and/or offering other public jobs⁹⁶ and resources to those willing to support them, presidential candidates form political alliances in order to have more time on

⁸⁹ Ibid, artigo 44.

⁹⁰ Artigo 1 da Lei Complementar nº 78, de 30 de dezembro de 1993, DOU 05/01/1994.

⁹¹ Constituição da República Federativa do Brasil, 1988, artigo 46, parágrafo 1º.

⁹² Melo and Pereira, *Making Brazil Work: Checking the President in a Multiparty System*. Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil*, 190.

⁹³ Artigo 17, parágrafo 3, da Constituição da República Federativa do Brasil, 1988. Artigo 44 e seguintes da Lei nº 9504/1997. This will be explored in chapter three and, in more detail, in chapter nine.

⁹⁴ Artigo 47, paragrafo 2º, inciso I, da Lei nº 9504/1997, atualizados pela Lei nº 13165 de 29 de setembro de 2015, DOU 26/11/2015. For a discussion about the coalitions' time on broadcast, see chapter nine.

⁹⁵ Santos and Vilarouca point out that almost all Brazilian presidential cabinets have reflected a parliamentary majority — Fabiano Santos and Márcio Grijó Vilarouca, 'Political Institutions and Governability from FHC to Lula' in Peter R Kingstone and Timothy J Power (eds), *Democratic Brazil Revisited* (University of Pittsburgh Press 2008) 69.

⁹⁶ It should be highlighted that Brazilian presidents have the power to appoint not only their 'minister or secretary-general but also at five, six, or even more levels down'. Barry Ames, *The Deadlock of Democracy in Brazil* (University of Michigan Press 2002) 25. In a comparative perspective 'Brazilian presidents have the power to make roughly 20,000 appointments to the top layer of the federal bureaucracy, compared to about 4,000 for their US counterparts'. Anthony W Pereira, 'Continuity Is Not Lack of Change' (2012) 38 *Critical Sociology* 777 780. In this context, appointments to the competition authority have been used in exchange for political support, as it will be seen in chapter six.

television (during the electoral campaign), and later have a majority in Congress (during the administration).⁹⁷

President Jair Bolsonaro, elected in November 2018 and who took office from January 2019, has been declaring that he intends to innovate such system of government by not forming permanent coalitions but instead negotiating each bill with the congressmen. However, as of February 2019, it is still unknown if that innovation will take place and, if so, to what extent.⁹⁸

2.4. The electoral system

Presidents and congressmen are all elected directly by the people.⁹⁹

Parties compete in *majoritarian* elections when it comes to elections for the Presidency and the Senate.¹⁰⁰

By contrast, Brazil has an *open-list proportional representation* system when it comes to the election for the Chamber of Deputies.¹⁰¹ This means that there is no party list previously ordered, but rather an extensive open list from which voters choose their candidates by name. Thus, ‘it is the number of votes individually obtained by each

⁹⁷ Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil*, 190. Melo and Pereira, *Making Brazil Work: Checking the President in a Multiparty System*. Sometimes coalitions are not based on ideological alignment. For instance, the leftist PT made alliances with the conservative PP during the Lula and Rousseff administrations. The PT and the PP are almost in opposite sides of the Brazilian political spectrum, as we have seen.

⁹⁸ Joelmir Tavares ‘Bolsonaro põe presidencialismo de coalizão à prova ao arriscar novo estilo’ *Folha de S. Paulo* (24 November 2018) <<https://www1.folha.uol.com.br/poder/2018/11/bolsonaro-poe-presidencialismo-de-coalizao-a-prova-ao-arriscar-novo-estilo.shtml>> accessed 06 January 2019.

⁹⁹ Since the enactment of the Constitutional Amendment n 25/1985 and the subsequent enactment of the Constitution 1988. Constituição da República Federativa do Brasil, 1988. Emenda Constitucional n° 25/1985.

¹⁰⁰ Constituição da República Federativa do Brasil, 1988, artigos 46 e 77.

¹⁰¹ Ibid, artigo 45.

candidate of a given party that determines his or her position on the party list and the chance of being elected', as Maria Kinzo puts it.¹⁰²

What I want to point out here is that *the electoral system encourages the importance of money*. Candidates for the Presidency need a large amount of money for the production of advertising material in the media,¹⁰³ and transportation because their potential voters are dispersed all over Brazil's vast territory (Brazil is the fifth largest country in the world in terms of land area and the fourth biggest democracy in terms of the total number of votes cast in a national election).¹⁰⁴

Candidates for the Congress, in turn, need a large amount of money because their constituency is also large: they need to reach potential voters dispersed all over their state (Brazil is a federal republic with 26 federal states and one federal district). The states are normally very large in terms of territory.¹⁰⁵ For instance, the state of São Paulo, which is an 'average' one in terms of territory, is around 248 thousand km², larger in territory than many countries, such as England. Moreover, states are also frequently quite large in terms of population and, consequently, electorate. For example, the state of Paraíba, an average one in terms of population, had about 2.5 million voters in 2014.¹⁰⁶

¹⁰² Maria D'Alva Kinzo, 'Funding Parties and Elections in Brazil' in Peter J Burnell and Allan Ware (eds), *Funding Democratization* (Transaction Publishers 2007) 118.

¹⁰³ For example, presidential candidates need money to produce high-quality broadcast ads.

¹⁰⁴ International IDEA (International Institute for Democracy and Electoral Assistance), 'Voter Turnout Database' <<https://www.idea.int/data-tools/data/voter-turnout>> accessed 22 July 2018.

¹⁰⁵ IBGE (Instituto Brasileiro de Geografia e Estatística), 'Estrutura territorial' <http://www.ibge.gov.br/home/geociencias/cartografia/default_territ_area.shtm> accessed 22 July 2018.

¹⁰⁶ TSE (Tribunal Superior Eleitoral), 'Estatísticas Eleitorais 2016 — Eleitorado' <<http://www.tse.jus.br/eleitor-e-eleicoes/estatisticas/eleicoes/eleicoes-anteriores/estatisticas-eleitorais-2016/eleicoes-2016>> accessed 22 July 2018.

2.5. Are the current Brazilian parties strong or weak?

Now that we have seen who the parties are, where they compete and what they compete for, I will briefly address a debate within the academic literature on Brazilian politics.

There is a school of thought which claims that Brazilian parties are weak.¹⁰⁷ For these scholars, parties are weak because of: (i) the repeated suppression of parties throughout Brazil's history, as we have seen; (ii) the country's late industrialisation, with a lack of early-organised working-classes, and consequently an absence of strong labour parties as it occurred in northern European countries, which were arguably vital for the development of well-institutionalised party system in these countries;¹⁰⁸ and/or (iii) an arguably recurrent legislation that boosted politicians' independence towards their parties.¹⁰⁹

The open-list proportional electoral system of the Chamber of Deputies stimulates this school of thought because this system encourages candidates to focus on their self-promotion instead of their party affiliation. For instance, in 2014, a voter from the state of São Paulo should choose one of the 1485 candidates for the Chamber. All these candidates competed for about 70 seats; and they competed not only with candidates from other parties, but also with candidates of their *own* party. Consequently, candidates for the Chamber of Deputies tend to give less emphasis to their party.

I do not dispute that some of these phenomena and features have undermined party strength. But, in my view, this does not mean that parties are weak.

¹⁰⁷ See, eg, Bolivar Lamounier and Rachel Meneguello, *Partidos Políticos e Consolidação Democrática: O Caso Brasileiro* (Brasiliense 1986). Scott Mainwaring, 'Brazil: Weak Parties, Feeble Democracy' in Scott Mainwaring and Timothy R. Scully (eds), *Building Democratic Institutions: Party Systems in Latin America* (Stanford University Press 1995). Power, *The Political Right in Postauthoritarian Brazil: Elites, Institutions, and Democratization*. For more references, see Fernando Guarnieri, 'A Força dos Partidos "Fracos"' (2011) 54 *Dados* 235.

¹⁰⁸ Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil*, 230.

¹⁰⁹ See, eg, Ames, *The Deadlock of Democracy in Brazil*.

To begin with, all candidates are required to belong to a party to run for office, as established by the Constitution.¹¹⁰ As such, parties are gatekeepers of who will run for office.¹¹¹

Moreover, parties do not seem weak when it comes to elections for president. The two main parties, the PSDB and the PT, financed a considerable part of their presidential candidates' campaigns in 2014.¹¹² The presidential candidates of these two parties frequently emphasised their party affiliations and how their parties behaved once they were empowered in the presidency. All presidential candidates attack not only their rivals' personal skills and capability, but sometimes even more the rival parties' past administrations. And a fair part of the voters of the PT and the PSDB seems to vote for these parties, regardless of who their candidates are. Likewise, Bolsonaro was elected in 2018 by arguing that he was the anti-PT candidate.

Similarly, parties also seem to be strong when it comes to elections for the Senate. The three main parties — MDB, PSDB and PT — have frequently financed their senatorial candidates.¹¹³ In addition, parties seem to be a recurrent theme during the senatorial campaign, and many voters apparently take the party into account when placing their vote at the ballot box.

Even when it comes to elections for the Chamber of Deputies, parties have some significance. The main candidates for the Chamber often publish campaign advertising materials in which they appear next to the parties' presidential candidates. And some voters also seem to take the party into account — they choose one of the parties' candidates.

¹¹⁰ Artigo 14, parágrafo 3, inciso V.

¹¹¹ Some have argued that Brazilian parties have low intra-party democracy. Guarnieri, 'A Força dos Partidos "Fracos"'. Oswaldo Amaral, 'As Transformações na Organização Interna do Partido dos Trabalhadores entre 1995 e 2009' (Tese de Doutorado em Ciência Política, Unicamp 2010).

¹¹² Transparência Brasil, 'As Claras — Quem financia quem nas eleições' <<http://www.asclaras.org.br/@index.php>> accessed 16 February 2018. This database uses official data from the Superior Electoral Tribunal.

¹¹³ Ibid.

Another important indication of party strength is that several works of empirical research have pointed out that Brazilian congressmen do behave cohesively and in a disciplined manner according to the indication of their party leaders.¹¹⁴ In other words, there is significant party discipline in Congress.

Finally, parties — and not candidates — receive significant public resources for political competition. They receive not only a large amount of public financial funding during electoral and non-electoral periods, but also free-access to broadcasts during elections. The importance of public funding to the political competition increased even more after recent changes in political finance legislation, as will be seen in the next chapter. In this sense, although some have argued that parties have frequently had only a minor role in financing their candidates' campaigns for the Chamber of Deputies,¹¹⁵ this has changed to a significant extent.¹¹⁶

To summarise, even acknowledging the existence of some setbacks to their development, parties are a key (perhaps *the* key) element of political competition in Brazil.

2.6. The media system

As in any other mass democracy, in Brazil most democratic debate takes place within the media. As such, the structure of the media is a key part of the country's

¹¹⁴ For discussion and references, see Carlos Pereira and Bernardo Mueller, 'Partidos Fracos na Arena Eleitoral e Partidos Fortes na Arena Legislativa: A Conexão Eleitoral no Brasil' (2003) 46 *Dados* 735. See also Carazza, *Dinheiro, Eleições e Poder: As Engrenagens do Sistema Político Brasileiro*, 114–120.

¹¹⁵ See, eg, Kinzo, 'Funding Parties and Elections in Brazil' 118.

¹¹⁶ Filipe Matoso and Gustavo Garcia 'Candidatos com mandato terão prioridade na distribuição do dinheiro do fundo eleitoral, dizem partidos' *GI* (16 July 2018) <<https://g1.globo.com/politica/eleicoes/2018/noticia/candidatos-com-mandato-terao-prioridade-na-distribuicao-do-dinheiro-do-fundo-eleitoral-dizem-partidos.ghtml>> accessed 25 July 2018.

democratic framework.¹¹⁷ In this section, I will give a brief account of the Brazilian media.

2.6.1. The hegemony of the television sector

Television has been the hegemonic media in Brazil. According to a comprehensive survey of the media consumption habits of the Brazilian population requested by the government in 2016, 63% of Brazilian citizens use television as their main source of information, while 26% mentioned the internet, 7% mentioned the radio and 3% mentioned the press.¹¹⁸ This is a significant hegemony, by international standards.¹¹⁹

Although the 2018 elections indicated that the consumption of information online has increased, television still seems to be the hegemonic media, as will be discussed in detail in chapter eight.

2.6.2. Media ownership is essentially private

In Brazil, not only the press, but also the television and radio sectors are in private hands. From the start, private companies were the ones who essentially delivered broadcast services: press tycoons received radio and television concessions from the

¹¹⁷ This argument will be comprehensively explored in chapter eight.

¹¹⁸ Presidência da República, Secretaria de Comunicação Social, 'Relatório Final Pesquisa Brasileira de Mídia — PBM 2016' (30 December 2016, updated at 7 June 2017) <<http://www.secom.gov.br/atuacao/pesquisa/lista-de-pesquisas-quantitativas-e-qualitativas-de-contratos-atuais/pesquisa-brasileira-de-midia-pbm-2016.pdf/view>> accessed 4 November 2017, 14. Although only 3% said that the press was their main source of information, it should be noted that many internet users may read press news on the internet. Moreover, Laurindo Filho reports that some radios 'translate' (ie, explain in a simpler way) press news to their audience. Laurindo Leal Filho, 'O comunicador diante do monopólio da mídia' (*ECA Pela Democracia*, 20 April 2016) <<https://youtu.be/aHHg8K6ulkM>> accessed 4 November 2017.

¹¹⁹ In this sense, see Ames, Baker and Rennó, 'The Quality of Elections in Brazil: Policy, Performance, Pageantry, or Pork?' 112.

state to provide services.¹²⁰ Therefore, Brazilian broadcasting developed as a private business — similar to the American model and in contrast to the European model centred on public broadcasting¹²¹ — and the Brazilian media as a whole developed organically as a cross-ownership¹²² sector.

It was only in 1988, with the introduction of the new Constitution, that the ‘principle of the complementary roles of private, public and state systems’ in relation to broadcasting was established (article 223). However, since this principle was never regulated by infra-constitutional legislation, it has been arguably ineffective.¹²³ Public broadcasting remains underfunded and with low viewership ratings, despite some recent efforts to change this situation.¹²⁴

2.6.3. The concentration of television ownership

Among the most developed Latin American countries — Argentina, Brazil, Chile, Mexico and Uruguay — Brazil has the most concentrated free-to-air television broadcasting market if we consider market share based on revenues.¹²⁵

¹²⁰ Venicio Artur de Lima, *Grande Mídia vs. Nova Mídia na Política Brasileira* (Paulus Editora 2010).

¹²¹ For a summary of the American and European models of broadcast, see Jill J McCluskey and Johan FM Swinnen, 'Media Economics and the Political Economy of Information' in David Coen, Wyn Grant and Graham Wilson (eds), *The Oxford Handbook of Business and Government* (Oxford University Press 2010).

¹²² Cross-media ownership means ‘one organization owning more than one type of public communications business’. ‘cross-media ownership, n’ (*Cambridge Dictionary Online*) <<http://dictionary.cambridge.org/dictionary/english/cross-media-ownership>> accessed 21 July 2018.

¹²³ See Lima, *Grande Mídia vs. Nova Mídia na Política Brasileira*. The Telecommunications Act of 1962 remains as the main legislation in force to regulate the broadcasting sector. Lei nº 4117, de 27 de agosto de 1962, DOU 17/12/1962.

¹²⁴ See subsection 8.3.4.

¹²⁵ Christof Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America: Whose Voice Gets on the Air?* (Springer 2016) 34, using data from 2004 from Martín Becerra and Guillermo Mastrini, 'Un Escenario Para Pocos: Estructura, Efectos e Indicadores de Concentracion Infocomunicacional Latinoamericana' in AMARC (ed), *Las Mordazas Invisibles Nuevas y Viejas Barreras a la Diversidad en la Radiodifusión* (Amarc-alc, Buenos Aires 2009) 317–334.

The privately owned¹²⁶ Globo TV receives about 75% of the advertisement money in the broadcast television market.¹²⁷ This concentration of advertisement reflects the audience: 56% of Brazilian television viewers have Globo TV channel as their main source of information.¹²⁸ When asked about their first and second sources of information, 73% of the Brazilian television viewers mentioned Globo TV.¹²⁹

Although the Constitution of 1988 establishes that ‘social communication media may not, directly or indirectly, be subject to monopoly or oligopoly’,¹³⁰ this provision was never regulated by infra-constitutional legislation, hindering its effectiveness.¹³¹

The ownership limits currently in force were mostly established by a decree from 1967: television companies cannot own more than 10 concessions; no more than five in the open territorial spectrum and two per state.¹³² However, television corporations can overcome these limits because they are authorised to build networks of *affiliate stations* and *retransmission stations* (which are formally independent stations that nonetheless produce the same content), in order to broadcast their content to the

¹²⁶ The Globo TV is controlled by the Marinho family. Grupo Globo, ‘Estrutura Corporativa’ <<https://grupoglobo.globo.com/estrutura-corporativa/>> accessed 24 July 2018.

¹²⁷ Cristiano Aguiar Lopes, *Reflexões sobre a Regulação da Radiodifusão no Brasil — Em Busca da Lei Geral de Comunicação Eletrônica de Massa* (Consultoria Legislativa 2005) 21.

¹²⁸ The other top favourite television channels as sources of information have around one-fifth of Globo’s preference: Record has 12% of the total preferences and SBT has 11% of the preferences. The survey asked participants to consider free-to-air and cable television channels all together in their answers. Presidência da República, Secretaria de Comunicação Social, ‘Relatório Final Pesquisa Brasileira de Mídia — PBM 2016’, 17.

¹²⁹ Ibid.

¹³⁰ Artigo 220, parágrafo 5.

¹³¹ See C Matos, ‘Media Democratization in Brazil: Achievements and Future Challenges’ (2012) 38 *Critical Sociology* 863.

¹³² Artigo 12, inciso 2, do Decreto-Lei nº 236, de 28 de fevereiro de 1967, DOU 28/2/1967 e retificado em 9/3/1967. For more details and other legislation, see Alexandre Ditzel Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet* (Fórum 2009) 168–175.

entire country.¹³³ Through these networks, television corporations are able to concentrate audience and advertising revenues.¹³⁴

Furthermore, it is worth mentioning another peculiarity of the Brazilian broadcast structure: despite a constitutional ban, several elected politicians own the affiliate stations and retransmission stations mentioned above.¹³⁵

¹³³ A great part of the independence of those *affiliate stations* and *retransmission stations* is constrained by exclusive agreements that they sign with the television corporations who produce content. See *ibid* 172–173.

¹³⁴ I will use the TV Globo, the largest television group, as an example. The Globo TV has five concessions (which are based in the largest cities, such as São Paulo and Rio de Janeiro), but more than 117 *affiliate stations*. These 117 affiliate stations, owned by other individuals, *work like franchise companies*: they not only broadcast TV Globo's signal (including news, commercials and so on), but also use TV Globo's logo. As observed by Mauersberger, for the audience, these affiliate stations are not distinguished from the original 'Globo'. Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America: Whose Voice Gets on the Air?* 193. Moreover, there are around 1405 *retransmission stations* that are part of TV Globo's network, and several of them are also independent but affiliate. These retransmission stations, authorised by the state, are located in more remote areas and simply repeat the signal of Globo's concessions or of its affiliate stations. As a result, TV Globo delivers its programming to 98.44% of Brazilian municipalities and over 183 million Brazilians. See Grupo Globo, 'Globo in Brazil' <http://redeglobo.globo.com/Portal/institucional/foldereletronico/ingles/g_globo_brasil.html> accessed 1 August 2018.

¹³⁵ After the issuance of the certificate of their electoral victory, deputies and senators *are prohibited from signing or maintaining a contract* with the state or a public utility company that holds a concession from the state. Artigo 54, inciso I, parágrafo a, da Constituição da República Federativa do Brasil, 1988. However, Brazilian authorities have constantly ignored that provision: in 2007, for instance, 10% of deputies and 31% of senators were owners of broadcast affiliate stations or retransmission affiliate stations. See, eg, Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America: Whose Voice Gets on the Air?* 160; Geraldo Magela Pierone and Andre Kron Marques Zapani, 'Coronelismo Eletrônico: a concentração do poder midiático nacional e no Paraná' (2016) 1 *Ação Midiática—Estudos em Comunicação, Sociedade e Cultura* 241–252; and Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet* 200. Many ADI (direct action of unconstitutionality) have been filed before the Brazilian Supreme Court (STF) contesting the issue, but the Court still have not analysed it.

In this same vein, some legal scholars have been arguing that another unconstitutionality has been taking place: although the Constitution establishes that *television and radio broadcasting are public utilities that should be exclusively operated by the Federal Government of Brazil, either directly or through authorisation, concession or permission* (artigo 21 inciso XII), and that the *concession or permission of public utility services will always be through public bidding* (article 175), broadcast concessions and permissions have been granted without public bidding, independently of which political party is in office. See, eg, Mello, *Curso de Direito Administrativo*, 698–699.

Several broadcast corporations are business partners of important politicians. Globo TV, for instance, has well-known links with important conservative political families, who own the affiliate stations that transmit the Globo TV's signal in their states. For example, the Collor family owns a TV Globo affiliate station in the state of Alagoas; the Magalhães family owns several TV Globo affiliate stations in the state of Bahia; and the Sarney family owns several TV Globo affiliate stations in the state of Maranhão. This framework allows these politicians to have an overwhelming influence over the public debate in their regional constituencies, especially through the local news programme. See Suzy Santos and Sérgio Capparelli, 'Coronelismo, Radiodifusão e Voto: A Nova Face de um Velho Conceito' in Valério Cruz Brittos and César Ricardo Siqueira Bolano (eds), *Rede Globo: 40 Anos de*

2.6.4. The conservative bias

Historically the Brazilian media has had low diversity of content, leaning towards a conservative bias.¹³⁶ It is illustrative that the three leading newspapers — Folha de S. Paulo,¹³⁷ O Estado de S. Paulo,¹³⁸ and O Globo¹³⁹ — all supported the 1964 conservative military coup. Similarly, it is emblematic that the country's main television corporation, Globo TV, was founded by the owners of O Globo newspaper and developed during the conservative military regime as an ally of the government.¹⁴⁰

Poder e Hegemonia (Paulus 2005); Pâmela Araújo Pinto, 'Mídia e Política no Brasil: Grande Imprensa x Coronelismo Eletrônico' (Congresso Brasileiro de Ciências da Comunicação, 2009).

Mauersberger has argued that the opposition of the traditional conservative media along with the opposition of conservative elected politicians helps to explain why in Brazil there has been no democratizing media reform so far, in contrast to what happened in other South American countries, such as Argentina and Uruguay. According to him: the dominant mass media largely neglect the debate, while reform demands are delegitimised in the formal political arenas as initiatives to censor the media. Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America: Whose Voice Gets on the Air?*, 38. A similar phenomenon may have happened in other countries. According to Brevini, for example, the initial optimism regarding two major media policy enquiries held between 2011 and 2012 in Australia was crushed by the hostility of big media corporations. For her, the concentration of media ownership enabled the big media corporations to establish the hegemonic policy narratives, undermining proposals for change. Media policy became Big Media Policy, she argues. Benedetta Brevini, 'From Media Policy to 'Big' Media Policy: The Battle for Pluralism in Australia' in Steven Barnett and Judith Townend (eds), *Media Power and Plurality: From Hyperlocal to High-Level Policy* (Palgrave Macmillan UK 2015).

Moreover, perhaps the progressive parties and politicians who do not own stations have made only shy attempts to change this system because they fear the reaction of broadcast corporations (as they depend on their favourable coverage to perform in elections and sometimes stay in government); and they fear losing the political support of those conservative politicians, who own affiliate stations, but who were also paradoxically a key part of progressive government coalitions, such as several conservative politicians were to the Workers' Party administrations.

¹³⁶ Fernando Antônio Azevedo, 'Mídia e Democracia no Brasil: Relações entre o Sistema de Mídia e o Sistema Político' (2006) 12 *Opinião Pública* 88 89.

¹³⁷ *Folha de S. Paulo*, 'Editorial: 1964' (30 March 2014) <<https://www1.folha.uol.com.br/opiniaio/2014/03/1433004-editorial-1964.shtml>> accessed 25 July 2018.

¹³⁸ José Maria Mayrink 'Estado' rompeu com regime após cancelamento de eleições' *O Estado de S. Paulo* (28 March 2014) <<https://politica.estadao.com.br/noticias/geral,estado-rompeu-com-regime-apos-cancelamento-de-eleicoes,1146309>> accessed 25 July 2018. See also Maria Victoria de Mesquita Benevides, *A UDN e o Udenismo: Ambiguidades do Liberalismo Brasileiro, 1945–1965* (Coleção Estudos Brasileiros, Paz e Terra 1981) 128.

¹³⁹ *O Globo*, 'Apoio editorial ao golpe de 64 foi um erro' (30 March 2014) <<https://oglobo.globo.com/brasil/apoio-editorial-ao-golpe-de-64-foi-um-erro-9771604>> accessed 25 July 2018.

¹⁴⁰ Power and Roberts argue that the conservative military regime helped Globo TV to build a virtual monopoly by boosting subsidised television purchasing and infrastructure, in exchange for favourable coverage. See Timothy J Power and J Timmons Roberts, 'A New Brazil? The Changing Sociodemographic Context of Brazilian Democracy' in Peter R Kingstone and Timothy J Power (eds), *Democratic Brazil: Actors, Institutions, and Processes* (2000) 258. Many cite the coverage of the *Diretas Já* movement as the foremost example of a biased report. When the movement broke out in

Surely, however, that conservative perspective may vary between a conservative liberal one (that is, more moderate) and an illiberal one (that is, less moderate). A deeper and updated analysis of this conservative tendency of the Brazilian media will follow in chapter eight.

2.7. Conclusion of the chapter

To summarise, Brazil has a multi-party system, in which the main parties have been the centrist Brazilian Democratic Movement (MDB), the centre-right Brazilian Social Democratic Party (PSDB) and the centre-left Workers' Party (PT). In the 2018 elections, the Social Liberal Party (PSL) emerged as part of the new worldwide populist right-wing movement and is now also a relevant actor.

At the federal level, Brazilian parties compete for seats in Congress (that is, the Chamber of Deputies and the Senate) and for the Presidency, which is the executive body. The country has a coalition-based presidential system of government. Since Brazilian parties rarely have a majority in Congress, presidents are stimulated to settle inter-party coalitions in order to pass legislation. In fact, a great deal of these coalitions are formed during elections, when presidential candidates seek more time on television to compete effectively (the electoral legislation grants access to television to all Brazilian parties and the presidential candidates can use the sum of the time assigned to the six largest parties of their coalitions).

the 1980s and took, in one day, more than a million people to the streets demanding direct presidential elections, Globo TV tried to hush the movement by ignoring its existence — see Mario Cesar Carvalho, 'Figueiredo ameaçou tirar concessão nas Diretas-Já, diz Boni' *Folha de S. Paulo* <https://www1.folha.uol.com.br/fsp/especial/tv_14.htm> accessed 25 July 2018. See also Fábio Konder Comparato, 'Tocando no Ponto Nevralgico: A Democratização da Informação e da Comunicação Social' in Fábio Konder Comparato (ed), *Para Viver a Democracia* (Ed. Brasiliense 1989) 140.

The electoral system stimulates the importance of money. Presidential candidates need to reach potential voters all over the large Brazilian territory. And candidates for the Congress also have a large constituency: they need to reach potential voters all over the states where they run, which are usually territorially large (for example, larger than some European countries), and large in population terms (in the millions, most frequently).

Finally, we have seen that the media, which covers political competition, is led by the television sector. And one private television corporation (Globo TV), which produces most of its journalistic content from a conservative perspective and has business links with several politicians, concentrates more than 50% of the news audience in the television sector.

Now that we have mapped the parties in Brazil, and where they operate (the electoral system, the system of government and the media system), in the next chapter we will investigate how they are financed.

Chapter Three

The political finance legislation in Brazil

3.1. Introduction

In 1955, political finance reportedly played a crucial role in the presidential campaign which ended with the electoral victory of Juscelino Kubitschek.¹⁴¹ Back then, Kubitschek essentially needed money to host campaign rallies, publish advertisements mostly on newspapers, travel around the country, and so forth.¹⁴²

More than sixty years later, political finance is no less important. Today, presidential candidates need money not only to travel around the country, but also to produce high-cost advertising materials that are broadcasted on television and radio as well as published on the internet, among other spending.¹⁴³

As put by Graeme Orr, perhaps ‘across the world, money in politics is the issue of our times’.¹⁴⁴

This chapter aims to give the reader a brief description of political finance legislation in Brazil, focusing on its most important aspects.¹⁴⁵ Although the chapter will

¹⁴¹ Edward Anthony Riedinger, *Como se Faz um Presidente: A Campanha de JK* (Nova Fronteira 1988) 242.

¹⁴² Ibid 247.

¹⁴³ See, eg, Felipe Ribas, ‘Os 5 maiores gastos de campanha de Bolsonaro e Haddad’ *Gazeta do Povo* (22 October 2018) <<https://www.gazetadopovo.com.br/eleicoes/2018/os-5-maiores-gastos-de-campanha-de-bolsonaro-e-haddad-4fexm5vuc4nwi9fjvcun6g3a>> accessed 15 December 2018.

¹⁴⁴ Graeme Orr, ‘Regulating Money in Politics: an International Perspective’ (Indonesia’s 5th National Conference on Constitutional Law, 2018) 1.

¹⁴⁵ Thus, this chapter does not aim to give a comprehensive account of the legislation by including every detail of it. For example, although foreign donations are indeed banned in Brazil, this will not

mostly address legislation, decisions from the Brazilian Supreme Court, the STF (acronym in Portuguese for *Supremo Tribunal Federal*), which shaped the legislation, will also be discussed.

The chapter is organised into three sections. Firstly, I consider what *objectives* political finance legislation might have. Secondly, I examine what *strategies* can be used to meet these objectives, and how they are implemented in Brazil.¹⁴⁶ Finally, in the third section, I will summarise Brazilian political finance legislation to argue that there was a shift in the legal framework — from a system essentially based on corporate donations, to one grounded on mixed sources — and discuss the extent to which the Brazilian legislation has been meeting regulatory objectives.

3.2. Regulatory objectives

We may organise the objectives of political finance legislation into three main groups, which are interdependent: (i) to ensure that the elected politician's attitude has not been impacted by the influence of private money; (ii) to promote equality of opportunity; and (iii) to improve the functioning of the party and electoral systems.

3.2.1. The integrity of the elected politicians' attitude

The first objective relates to the *integrity of elected politician behaviour*. The office-holder's conduct should not be corrupted by private donations. Therefore, this

be explored because this has not been an issue for the Brazilian democracy lately and will not be discussed throughout this thesis.

¹⁴⁶ The approach of organising the study of political finance legislation by focusing first on its objectives and later on the strategies implemented to meet these objectives was inspired by the reading of Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*.

objective consists of the prevention of *quid pro quo* and dependence corruption in the political process.

As we have seen in chapter one, *quid pro quo* corruption occurs when a candidate agrees (the *pro*) with a wealthy donor to receive a ‘donation’ (the *quid*) and, in return, exercise his power in office to benefit the donor (the *quo*). Under this circumstance, a donation is a form of bribe. And the agreement between the candidate and the donor is, therefore, a crime.

Dependence corruption, in turn, is harder to detect. It occurs when an office-holder is dependent ‘on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest’.¹⁴⁷ Because politicians frequently want to get re-elected or run for another office in the future, they might feel disinclined to take a decision that will displease corporate interests, or might give the donor privileged access to their decision-making. Similarly, a politician might be psychologically grateful for such a large donation, which may impact his reaction to a donor’s lobbying.

3.2.2. The equality of opportunity

The second objective might be to promote *equality of opportunity* in the democratic process. The exact meaning of this objective will vary according to the conception of democracy underpinned. I will focus on two of the most common ones.

The competitive elitism conception of democracy, perhaps mostly known as being advanced by Joseph Schumpeter, is a more restricted conception. For Schumpeter, democracy means ‘that people have the opportunity of accepting and refusing the men

¹⁴⁷ *McCloy v New South Wales* at 47 [36].

who are to rule them...'.¹⁴⁸ In this way, democracy is understood as the competition between rival political leaders, organised in parties, for the mandate to rule.¹⁴⁹ As long as people can choose 'between (at least two) broadly different party platforms' and citizens have the ability to replace one party by another in government, democracy exists.¹⁵⁰ Thus, for those who advance a Schumpeterian conception of democracy, *political finance legislation should aim for equality of opportunity between political parties, to a degree that enables the government to be changed.*

A more enlarged conception of democracy is proposed by John Rawls. For him, "citizens similarly gifted and motivated [should] have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class".¹⁵¹ Thus, not only those who run for political office, but also citizens who are not politicians, should have equal opportunity to influence the government. Under a Rawlsian conception of democracy, *political finance legislation should aim for the promotion of equality of opportunity for politicians and non-politicians, as much as is practical.*

Under both conceptions of democracy, the objective of equal opportunity in political finance legislation relates to the prevention of war chest corruption, which occurs when the volume of wealthy donations is so high that it distorts electoral competition. The central idea is that the flow of political debate within the public sphere should not be dominated by a single voice or interest.¹⁵²

¹⁴⁸ Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (5th edn, Allen and Unwin 1976) 284.

¹⁴⁹ Held, *Models of Democracy*, 179. See also John Dryzek and Patrick Dunleavy, *Theories of the Democratic State* (Macmillan International Higher Education 2009) 43–44.

¹⁵⁰ Held, *Models of Democracy*, 179.

¹⁵¹ John Rawls, 'The Basic Liberties and their Priority' (1982) 3 The Tanner Lectures on Human Values 3 73.

¹⁵² See subsection 7.3.3 for a deeper discussion, taking into consideration both conceptions of democracy.

3.2.3. The well-functioning of the political parties and the political process

Finally, political finance legislation may also assist the *functioning of political parties and the political process*.¹⁵³ In this sense, we may argue that political finance legislation should ensure that political parties are adequately funded because they are the bridge between society and the state in representative democracies. Additionally, we may argue that political finance legislation must enhance citizen participation in the funding of parties because this gives legitimacy and stability to the process of government.¹⁵⁴

3.3. Regulatory strategies

In this section, I will briefly explore the regulatory strategies used to meet the above-mentioned objectives in Brazil.

As it will be seen, the strategies used may simultaneously meet more than one of the objectives. For instance, a given legislation that aims to protect politicians' autonomy from corporate money may, at the same time, promote equality of opportunity in the democratic process.

Moreover, I shall clarify: I will use deductive reasoning to discuss how the strategies meet the objectives previously mentioned. I will not explore justifications used by legislators in practice, which is beyond the scope of this thesis.¹⁵⁵ In any event, the justifications used by legislators in practice will always relate to one of the objectives I

¹⁵³ See, eg, Daniel Zovatto, 'International Congress on Electoral Financing and Democracy' (*Tribunal Superior Eleitoral*, 17 June 2015) at 1:35:10 <<https://youtu.be/4B7w0YvKrac>> accessed 4 November 2017.

¹⁵⁴ Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*, 33.

¹⁵⁵ For a historical investigation of the evolution of part of the Brazilian legislation on political finance, and the political contextualisation and congressional justifications behind it, see Cíntia Pinheiro Ribeiro de Souza, 'A Evolução da Regulação do Financiamento de Campanha no Brasil (1945–2006)' (2013) n 3, jan/jun 2013 *Resenha Eleitoral — Revista Eletrônica do TRES*.

have mentioned in the last section, and, more particularly, to one of the rationales that will be given below for each strategy.¹⁵⁶

This section has four parts: (i) it will begin with *transparency and disclosure* strategy; (ii) then it will examine *private money controls*; (iii) subsequently *public funding* legislation will be discussed; (iv) and, finally, *spending controls* are analysed. Each of these subsections, in turn, will explore the definition of each strategy, the rationales behind it¹⁵⁷ and the Brazilian legislation on it.

3.3.1. Transparency and Disclosure

Definition and Rationale

The main objective of transparency and disclosure is to protect the integrity of the elected politician's attitude.¹⁵⁸ In this sense, the enhancement of 'transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties'¹⁵⁹ was agreed at the United Nations Convention against Corruption (UNCAC), which Brazil signed in 2003 and ratified in 2005.¹⁶⁰

¹⁵⁶ The rationales given for each strategy will relate to the Brazilian legislation that will be addressed in this chapter. Thus, they will not cover the rationales that might be behind other legislation that will not be discussed here. For a comprehensive discussion of the possible rationales for each strategy, see Magnus Ohman, 'Getting the Political Finance System Right' in Elin Falguera and others (eds), *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (IDEA 2014).

¹⁵⁷ Although the literature on political finance is broad, the concept and rationales of each strategy will mostly rely on Keith Ewing's 'The Cost of democracy: Party Funding in Modern British Politics' and Magnus Ohman's 'Getting the Political Finance System Right' because of their comprehensive focus on these issues.

¹⁵⁸ Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*, 44. See also Ohman, 'Getting the Political Finance System Right' 28.

¹⁵⁹ UNGA United Nations Convention Against Corruption 31 October 2003 A/58/422 Article 7 item 3.

¹⁶⁰ Decreto n° 5687, de 31 de janeiro de 2006, DOU 01/02/2006.

Moreover, the transparency strategy may assist the functioning of the electoral process because it allows voters to make informed decisions¹⁶¹ and enables the enforcement of private funding and spending controls.¹⁶²

At least some form of reporting requirements exist in nearly 90% of the 180 countries analysed by the International Institute for Democracy and Electoral Assistance (International IDEA).¹⁶³ Usually, reporting requirements are for political parties as well as candidates.

The Brazilian legislation

Currently, the Constitution of 1988,¹⁶⁴ the Political Parties Act¹⁶⁵ and the Elections Act¹⁶⁶ constitute the regulatory basis for transparency and disclosure obligations.

Parties are required to submit an annual report to the electoral courts.¹⁶⁷

In addition, during electoral campaigns, legislation requires parties, their candidates, and campaign committees to disclose on a website created by the Electoral Justice, within 72 hours, any financial resources received.¹⁶⁸ Moreover, they must submit a detailed report within the middle of the election (that is, 15 September).¹⁶⁹ Finally, the campaign committees must submit, in up to 20 or 30 days after the elections,

¹⁶¹ Ohman, 'Getting the Political Finance System Right' 28.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Artigo 17, inciso III, da Constituição da República Federativa do Brasil, 1988.

¹⁶⁵ Lei nº 9096/1995.

¹⁶⁶ Lei nº 9504/1997.

¹⁶⁷ Artigo 32 da Lei nº 9096/1995. Brazil has specialised electoral judges, who are a branch of the Judiciary (ie, the Electoral Justice), and are responsible for guaranteeing the legality of the electoral process.

¹⁶⁸ Artigo 28, parágrafo 4, inciso I, da Lei nº 9504/1997 atualizado pela Lei nº 13165/2015.

¹⁶⁹ Artigo 28, parágrafo 4, inciso II, da Lei nº 9504/1997 atualizado pela Lei nº 13165/2015. They must detail the transfer from the Parties Public Fund, the financial resources received, the non-financial resources received, and the expenses made.

a final report about the candidates' and committees' funding.¹⁷⁰ The electoral courts must analyse the accounts of all candidates in up to three days before the empowerment of the elected candidates.¹⁷¹

According to a recent ruling of the Supreme Court, transparency and disclosure in candidate funding are crucial to the democratic and republican regime established by the Constitution. In 2018, the Court declared that a statutory provision introduced in 2015, which allowed hidden donations, violated the Constitution. According to the statutory provision, parties would not be required to disclose the origin of their cash transfers to candidates' campaigns. It would be possible to identify which individuals donated to which parties, but it would not be possible to identify which candidate used that money. Petitioned by the Brazilian Bar Association, the Supreme Court decided that the statutory provision was unconstitutional because: (a) it prevented the electoral courts from effectively exercising its supervisory power granted by the Constitution;¹⁷² and (b) it harmed the democratic and republican principles since it prevented voters from having full information about candidates.¹⁷³

3.3.2. Private Funding Controls

Definition and Rationale

¹⁷⁰ All committees must submit the final report up to 30 days after the elections. The exception is for the candidates for the executive who will decide the election in a runoff, who must submit the final report up to 20 days after the final round. Artigo 29, incisos III e IV, da Lei nº 9504/1997, atualizado pela Lei nº 13165/2015.

¹⁷¹ Artigo 30, parágrafo 1º, da Lei nº 9504/1997, atualizado pela Lei nº 13165/2015.

¹⁷² STF, ADI 5394/DF, Rel Min Alexandre Moraes, DJ 06/04/2018. Justice Alexandre Moraes, who was the rapporteur for the case and the leading vote for the majority, reaffirmed all the grounds argued by Justice Teori Zavascki when the latter granted the injunction. For the conclusion on Justice Teori Zavascki's opinion, see STF, ADI 5394 MC/DF, Inteiro Teor do Acórdão 16.

¹⁷³ STF, ADI 5394 MC/DF, Inteiro Teor do Acórdão 20.

Another key regulatory strategy 'is to control who may give to political parties and how much they give'.¹⁷⁴

A ban on certain sources may 'help to ensure that the parties are no longer responsive to these interests'.¹⁷⁵ In addition, this strategy may sometimes help to ensure that campaign finance is grounded on contributions of citizens,¹⁷⁶ rather than legal fictions, such as corporations and trade unions.

A cap on contributions, in turn, may stimulate equality of opportunity between citizens, by guaranteeing their participation on an equal basis. Simultaneously, this strategy may protect the integrity of elected officials by ensuring that a given donation will not likely turn their heads.¹⁷⁷

Most of the countries analysed by the IDEA International ban at least one source of funding, while more than 40% adopt some form of cap on contributions.¹⁷⁸

The Brazilian legislation

Very few countries allow corporate donations to political parties and candidates while completely banning donations from trade unions at the same time.¹⁷⁹ Between 1993 and 2015, Brazil was one of these countries. In 2015, *the Supreme Court put an end to this peculiarity by declaring the unconstitutionality of the statutory provisions*

¹⁷⁴ Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*, 45.

¹⁷⁵ Ibid 46.

¹⁷⁶ Banning private donations altogether is exceptionally rare. The reason is that a total ban on private donations excludes citizen's participation in the funding of political parties. Besides, it may encourage hidden donations. See Ohman, 'Getting the Political Finance System Right' 22.

¹⁷⁷ Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*, 46.

¹⁷⁸ Ohman, 'Getting the Political Finance System Right' 22.

¹⁷⁹ Only Argentina, Singapore, Uruguay and six Balkan countries (Bosnia and Herzegovina, Croatia, Montenegro, Romania, Serbia and Slovenia) have similar legal frameworks. See International IDEA (International Institute for Democracy and Electoral Assistance), 'Political Finance Database' <<http://www.idea.int/political-finance/index.cfm>> accessed 30 July 2016.

that regulate corporate donations.¹⁸⁰ The opinion of all the justices who formed the majority¹⁸¹ had arguments appealing to the protection of the integrity of elected politicians and to equality of opportunity.¹⁸²

But, while hearing the same case, the Court upheld the constitutional validity of: (i) a statutory provision that established contribution limits based on a *percentage* of the individual's income; and (ii) a provision that enabled candidates to use *their own resources up to the spending limit*. Although most justices initially reasoned that those criteria violated the principle of equality of the Constitution because they benefited the wealthy,¹⁸³ the Court eventually found problematic the plaintiff's demand — that is, asking the Court to urge the Congress to enact legislation establishing an uniform limit for all individuals' donations and use of own resources by candidates at a level low enough to not overly compromise equality in elections; and, if the Congress failed to enact the legislation within 18 months, the Superior Electoral Court would have the

¹⁸⁰ STF, ADI 4650/DF.

¹⁸¹ Justices Luiz Fux, Luís Barroso, Carmen Lúcia, Ricardo Lewandowski, Joaquim Barbosa, Marco Aurélio Mello, Dias Toffoli and Rosa Weber.

¹⁸² In Brazil, frequently each justice publishes her own opinion, and they agree on whose opinion will be the leading one, as it occurred in this case. The opinion of Justice Luiz Fux, the rapporteur for the case, led the 8–3 majority. The centre-left Workers' Party administrations appointed seven of the eight justices that constituted the majority. For a comprehensive analysis of Fux's opinion, see Arthur Guerra Filho, 'The Brazilian Supreme Court's ADI 4650 Decision: A Step Towards the End of Plutocracy?' (2017) 28 King's Law Journal 167. One of Fux's main arguments was that there was an inequality between legal entities: while companies could donate, trade union contributions were banned. In this aspect, the *ADI 4650* decision contrasts with a previous ruling of the Supreme Court's plenary of 1994, which held that the inequality between legal entities on political finance did not violate the Constitution (ADI 1076-0). The Court of 1994 unanimously held that the ban on trade union political donations was reasonable given that unions represent an entire category, regardless of individual voluntary membership, and receive compulsory union dues (established by legislation) from all members of the respective category. In addition, the majority of the Court held that non-union trade associations, though representing only those who voluntarily pay membership dues, also should be banned from making donations because the legislator arguably intended to ward off non-union trade associations from the political process, by distinguishing them from civil associations in general (eg, art 5, item LXX of the Constitution). All nine justices who took part in the judgment were appointed by presidents aligned with conservatism: Ernesto Geisel, João Figueiredo (military presidents who ruled during the authoritarian regime), José Sarney and Fernando Collor (the first two civilian presidents after democratisation). STF, ADI 1076-0/DF, Rel Min Sepúlveda Pertence, DJ 07/12/2000.

¹⁸³ For a more detailed analysis about the reasoning and decision-making process of the Court on these matters, see Filho, 'The Brazilian Supreme Court's ADI 4650 Decision: A Step Towards the End of Plutocracy?'.

competence to temporarily regulate the issues. The justices preferred to act with self-restraint and ruled that there is no constitutional basis for the Supreme Court to advance on typical duties of the Legislature, and delegate them to the Superior Electoral Court, in the manner requested by the plaintiff.¹⁸⁴

The statutory provisions on these issues have remained controversial since then. In the 2018 elections, *individuals were able to donate up to 10% of the gross income earned in the year preceding an election.*¹⁸⁵ By maintaining this criterion, the Supreme Court and legislators have kept Brazil in an extremely small group of countries. Of the forty-two countries that are above Brazil in the Democracy Ranking 2015,¹⁸⁶ only two (Lithuania and South Korea) adopt contribution limits based on a percentage of the individual's income.¹⁸⁷ In contrast, twenty-two of them adopt a uniform limit for all individuals: Argentina, Belgium, Bulgaria, Canada, Chile, Costa Rica, Croatia, Cyprus, Finland, France, Greece, Ireland, Israel, Italy, Japan, Latvia, Poland, Portugal, Slovenia, Spain, United States and Uruguay.¹⁸⁸

And, so far as self-funding is concerned, *candidates in the 2018 elections were able to use their own resources up to the spending limit established for the position to which they competed.*¹⁸⁹ As will be seen in subsection 3.3.4, spending limits were quite high, which raises questions of equality of opportunity between candidates.

¹⁸⁴ ADI 4650/DF, Inteiro Teor do Acórdão 175. The Court's decision was strategic: according to Justice Marco Aurélio Mello's understanding, which prevailed during the deliberation between the justices on these issues, it would be left to the Supreme Court only to decide the constitutionality of the provisions. Under this scenario, declaring unconstitutionality would result in a complete lack of regulation for individuals' donations. Therefore, individuals would be unable to make donations, thus undermining the democratic participation of citizens instead of enhancing it. Therefore, this 'exchange of unconstitutional situations' would not be worthwhile, in the words of Justice Mello.

¹⁸⁵ Lei nº 9504/97, artigo 23, parágrafo 1, atualizado pela Lei nº 13165/2015.

¹⁸⁶ David F J Campbell and others, *Democracy Ranking 2015 (Scores)* (Democracy Ranking 2015).

¹⁸⁷ IDEA, Political Finance Database — accessed 30 July 2016.

¹⁸⁸ Ibid. Seventeen other countries — such as the United Kingdom — do not limit contributions. IDEA did not register data on Hong Kong.

¹⁸⁹ Artigo 29, parágrafo 1º, da Resolução nº 23553, de 18 de dezembro de 2017, DJE-TSE, nº 25, de 2/2/2018, 316–346.

Finally, it should be noted that Brazil lacks clear regulation on third-party independent expenditures because the practice has not been very frequent so far, although the 2018 presidential election may have shown some signs that the practice could increase in the future.¹⁹⁰

3.3.3. Public Funding

Definition and Rationale

The state might have a ‘role that involves supporting rather than regulating parties. This can take the form of aid in kind for the parties by the State, or the direct subsidy of the parties by the State’.¹⁹¹

Public funding may have three main justifications.¹⁹² Firstly, it may protect the integrity of elected politicians by making them less dependent on wealthy donations.

Secondly, it may stimulate equality of opportunity between competitors, depending on how resources are distributed. For instance, it may allow parties that are not business-friendly to compete more effectively with ones that are.

And, finally, it may ensure the proper functioning of political parties, by guaranteeing that they have enough resources to compete and reach potential voters.

Almost every western democracy has some kind of public funding.¹⁹³ However, there is controversy as to how resources are distributed. The eligibility criteria adopted around the world are diverse,¹⁹⁴ and every criterion has mixed effects.

¹⁹⁰ Patrícia Campos Mello, ‘Empresários bancam campanha contra o PT pelo WhatsApp’ *Folha de S. Paulo* (18 October 2018) <<https://www1.folha.uol.com.br/poder/2018/10/empresarios-bancam-campanha-contra-o-pt-pelo-whatsapp.shtml>> accessed 15 December 2018.

¹⁹¹ Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*, 52.

¹⁹² For a discussion about the types of public funding and the rationales behind it, see Graeme Orr, ‘Full Public Funding: Cleaning Up Parties or Parties Cleaning Up?’ in Jonathan Mendilow and Eric Phélippeau (eds), *Handbook of Political Party Funding* (Edward Elgar Publishing 2018).

The Brazilian legislation

Public funding, particularly the criteria for its distribution, has been constantly changing over the years in Brazil and has been the subject of frequent judicial disputes within the Supreme Court, as will be seen in chapter nine. In the pages below, I will address how they are currently structured.

Brazil has two types of public funding: (i) financial (also known as direct public funding); and (ii) free-access to broadcasts (also known as indirect public funding).

In 1965,¹⁹⁵ the *Fundo Partidário* ('Parties' Fund') was created, consisting of public financial resources for parties. The existence of the fund now has constitutional recognition, as it was incorporated into the Constitution of 1988.¹⁹⁶ It is designed to cover various party expenses, such as political advertisements, the maintenance of an institute or foundation of research, the payment of tuition and annuities to international party organisations, and expenses with food.¹⁹⁷ In 2018, around R\$ 888 million (about £184 million) in total were distributed through the *Fundo Partidário*,¹⁹⁸ according to the following criteria: 5% of the funds allocated on an equal basis to all parties that are registered at the Superior Electoral Court, and 95% allocated in proportion to the votes

¹⁹³ Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*. All countries that are members of the OECD (Organisation for Economic Co-operation and Development) adopt public funding. OECD, *Financing Democracy* (2016) 39. It should be noted, however, that *exclusive* public funding is highly controversial. The fear is that parties might become distant from society and excessively dependent of the state. Thus, this would harm parties' *raison d'être* — ie, to be the bridge between the society and the state.

¹⁹⁴ Ohman, 'Getting the Political Finance System Right' 24.

¹⁹⁵ Lei nº 4740, de 15 de julho de 1965, DOU 19/07/1965. See de Souza, 'A Evolução da Regulação do Financiamento de Campanha no Brasil (1945–2006)'. For a brief account of the evolution of the legislation on this matter, see also Adla Youssef Bourdoukan, 'O Bolso e a Urna: Financiamento Político em Perspectiva Comparada' (Tese de Doutorado em Ciência Política, Universidade de São Paulo 2009) 77; and Sídia Maria Porto Lima, *Prestação de Contas & Financiamento de Campanhas Eleitorais* (2014) 89.

¹⁹⁶ Artigo 17, parágrafo 3, da Constituição da República Federativa do Brasil, 1988.

¹⁹⁷ Artigo 44 da Lei nº 9096/1995.

¹⁹⁸ André de Souza, 'Candidatos terão dois fundos públicos para financiar campanha em 2018' *O Globo* (14 February 2018) <<https://oglobo.globo.com/brasil/candidatos-terao-dois-fundos-publicos-para-financiar-campanha-em-2018-22396526>> accessed 11 June 2018.

obtained in the previous election for the Chamber of Deputies.¹⁹⁹ But, from 2019 onwards, a barrier clause will be in force. The barrier clause will gradually increase in 2023, 2026, and finally, in 2030, so that entitlement for this public fund will apply only to the parties that have obtained a minimum 3% of the valid votes in the elections to the Chamber of Deputies, distributed in at least 1/3 of the states, with a minimum of 2% of the valid votes in each of them; and the parties that have elected at least 15 federal deputies distributed in at least 1/3 of the states of the federation.²⁰⁰

In 2017, the Congress and president Michel Temer created an additional financial public funding, destined exclusively to cover parties' expenses in elections. It is called *Fundo Especial de Financiamento de Campanha* ('Special Fund for Campaign Financing').²⁰¹ Congressmen were arguably concerned about a lack of financial resources due to the Supreme Court's corporate contributions ban in 2015.²⁰² In the 2018 elections, this new financial public funding was around R\$ 1.7 billion (around £350 million).²⁰³ The fund's distributive criterion was the following: 2% equally divided among all parties registered at the Superior Electoral Court; 35% divided among parties that have at least one representative in the Chamber of Deputies, in proportion to the percentage of votes they obtained in the last election for the Chamber of Deputies; 48% divided among the parties in proportion to the number of seats that they have in the

¹⁹⁹ Artigo 7, parágrafo 2º, e artigo 41-A da Lei nº 9096/1995, este último atualizado pela Lei nº 12875, de 30 de outubro de 2013, DOU 31/10/2013 e pela Lei nº 13165/2015. Moreover, 30% of the fund should be assigned to women candidates, in each party. See STF, ADI 5617/DF, Rel Min Edson Fachin, DJ 23/03/2018.

²⁰⁰ Artigo 3 da Emenda Constitucional nº 97, de 4 de outubro de 2017, DOU 05/10/2017.

²⁰¹ Lei nº 13487, de 6 de outubro de 2017, DOU Edição Extra de 06/10/2017.

²⁰² Carol Siqueira, 'Eleição de 2018 será a primeira disputa com fundo público para campanhas' *Agência Câmara Notícias* (22 January 2018) <<http://www2.camara.leg.br/camaranoticias/noticias/POLITICA/551780-ELEICAO-DE-2018-SERA-A-PRIMEIRA-DISPUTA-COM-FUNDO-PUBLICO-PARA-CAMPANHAS.html>> accessed 11 June 2018.

²⁰³ Thiago Faria, 'Fundo público eleitoral dá mais dinheiro a 21 partidos' *O Estado de S. Paulo* (29 January 2018) <<https://politica.estadao.com.br/noticias/geral,fundo-publico-eleitoral-da-mais-dinheiro-a-21-partidos,70002169284>> accessed in 11 June 2018.

Chamber of Deputies; and 15% divided among the parties in the proportion to the number of seats that they have in the Senate.²⁰⁴

Adding up the ‘Parties Fund’ and the ‘Special Fund for Campaign’, parties received in total more than R\$ 2.5 billion (more than £520 million) in 2018.²⁰⁵

Apart from the financial public funds, parties also receive free-access to broadcasts during elections, as established by the Constitution and regulated by electoral legislation.²⁰⁶ Currently, 10% of the time is distributed equally to all political parties; and 90% is distributed in proportion to the number of representatives in the Chamber of Deputies of the last legislature.²⁰⁷ The same barrier clause mentioned above for the Parties’ Fund will be in force for the granting of the free-access to broadcast from 2019.²⁰⁸ Paid broadcast advertisement is banned during elections, which takes us to the next subsection.²⁰⁹

3.3.4. Spending Controls

Definition and Rationale

Finally, the last regulatory strategy focuses on the demand side, rather than the supply side. As defined by Keith Ewing,

²⁰⁴ Lei nº 13488, de 6 de outubro de 2017, DOU Edição Extra de 6/10/2017.

²⁰⁵ Souza, ‘Candidatos terão dois fundos públicos para financiar campanha em 2018’.

²⁰⁶ Artigo 17, parágrafo 3, da Constituição da República Federativa do Brasil, 1988. Artigo 44 e seguintes da Lei nº 9504/1997. Parties also had free access to broadcasts during non-electoral periods, but this was revoked in 2017. Congressmen transferred the money that was used to pay broadcasters to the new Special Fund for Campaign Financing. *Agência Senado*, ‘Senado e Câmara têm 15 dias para votar reforma eleitoral’ (21 September 2017) <<https://www12.senado.leg.br/noticias/materias/2017/09/21/senado-e-camara-tem-15-dias-para-votar-reforma-eleitoral/tablet>> accessed 11 June 2018.

²⁰⁷ Artigo 47, parágrafo 2º, da Lei nº 9504/1997, atualizado pela Lei nº 13165/2015.

²⁰⁸ Emenda Constitucional nº 97/2017.

²⁰⁹ Artigo 44 da Lei nº 9504/1997.

Here the aim is to regulate by controlling the spending which the parties may lawfully incur, principally, though not exclusively, through the medium of spending limits, particularly at election time. This strategy may entail banning certain kinds of expenditure, or the amount that may be spent by electoral actors, or both.²¹⁰

There may be three main rationales behind the implementation of spending bans and limits. Firstly, spending limits may promote equality of opportunity between competing parties and competing candidates.²¹¹

Secondly, as spending limits reduce overall spending on campaigns, this may lessen politicians' temptation to 'seek or accept funding from tainted sources, or with strings'.²¹² Thus, it may protect the integrity of elected politicians. In addition, we may argue that, if every party/candidate has the same cap, it is easier to supervise spending, and consequently those whose spending originated from a slush fund.

Thirdly, spending bans and limits may encourage the proper functioning of the electoral process by promoting a democratic deliberation more centred on the candidates' capabilities and qualifications to the public post and the content of their policy proposals; and less centred on overly advertised campaigns and media pyrotechnics.²¹³

²¹⁰ Ewing, *The Cost of Democracy: Party Funding in Modern British Politics*, 49–50.

²¹¹ Ibid 50. Under a Rawlsian conception of democracy, cheaper campaigns might encourage regular citizens to run for political posts.

²¹² Ibid.

²¹³ Bruno Speck, 'O Financiamento de Campanhas Eleitorais' in José Jairo Gomes (ed), *Direito eleitoral* (5 edn, Del Rey 2010) 154 (as cited in Cláudio Pereira de Souza Neto and Daniel Sarmento, 'A Inconstitucionalidade do Financiamento de Campanha por Empresas e o Financiamento Democrático de Campanha' in Aldo Arantes and others (eds), *A OAB e a Reforma Política Democrática* (OAB, Conselho Federal 2014) 29).

Around 30% of all countries limit the amounts that political parties may spend, while over 40% limit candidate spending.²¹⁴

*The Brazilian legislation*²¹⁵

The Electoral Code of 1950 introduced spending limits in Brazil.²¹⁶ But it established that parties should fix their own caps. Thus, there were no de facto spending limits.²¹⁷ And this remained the rule for more than 65 years.

But in 2015, the Congress and president Dilma Rousseff introduced the first de facto spending caps.²¹⁸ For presidential candidates, the spending limit was R\$ 70 million (around £14.5 million) in the 2018 election.²¹⁹ The two candidates that passed to the second round were able to spend about R\$ 35 million (around £7.25 million) more. The spending limits for candidates for the Senate varied in accordance with the population size of the state in which they competed. They could spend up to between R\$ 2.5 million (around £520 thousand) in smaller states, and R\$ 5.6 million (around £1.16 million) in larger states.²²⁰ And the spending limits for candidates for the Chamber were settled at

²¹⁴ Ohman, 'Getting the Political Finance System Right' 27.

²¹⁵ Although the Brazilian legislation does ban certain types of spending, I will focus this subsection on spending limits, which are a pillar of every political finance system. The spending bans will be mentioned accordingly during the thesis.

²¹⁶ See Bourdoukan, 'O Bolso e a Urna: Financiamento Político em Perspectiva Comparada' 75. Artigo 143, inciso I, da Lei nº 1164, de 24 de julho de 1950, DOU 26/07/1950.

²¹⁷ Although the legislation in force between 1997 and 2015 established that the spending limits would be settled by the Congress every electoral year, in practice Congress never settled such limits. As a consequence, each political party was responsible for setting its own spending limits and reporting them to the electoral courts. In other words, political parties ended up with full autonomy to fix their spending limits. Parties and candidates usually established a high limit, so they could spend the amount they wanted to, without being concerned about the limit. See Aline Osório and Daniel Sarmiento, 'Eleições, Dinheiro e Democracia: A ADI 4.650 e o Modelo Brasileiro de Financiamento de Campanhas Eleitorais' (2014) 26 *Direitos Fundamentais & Justiça* 15 21; Daniel Sarmiento and Aline Osório, 'Uma Mistura Tóxica: Política, Dinheiro e o Financiamento das Eleições' in Daniel Sarmiento (ed), *Jurisdição Constitucional e Política*, vol 1 (1 edn, Forense 2015); Denise Goulart Schlickmann, *Financiamento de Campanhas Eleitorais* (Juruá 2014) 310.

²¹⁸ Artigos 5, 6, 7 e 8 da Lei nº 13165/2015.

²¹⁹ Artigo 5 da Lei nº 13488/2017.

²²⁰ Artigo 6, parágrafo 2, da Lei nº 13488/2017.

R\$ 2.5 million (around £520 thousand) for those who competed in states,²²¹ and R\$ 1 million (around £210 thousand) for those who competed in the federal district.²²²

3.4. The transformation of the political finance system: from corporate to mixed

As we have seen in the last section, the Brazilian political finance framework has changed from one which was largely *centred on corporate donations*, to a configuration based on *public funding, use of own resources and individuals' donations*.

3.4.1. The system based on corporate donations

The system centred on corporate donations was in force from 1993 to 2015. As mentioned in the last section, during that period, Brazil had a controversial legal framework: while private corporations were allowed to donate a great amount of money,²²³ contributions from trade unions, professional associations and non-profit organisations were banned. This framework enabled corporate donations to be hegemonic during that cycle. In other words, most of the money circulated in the elections came from companies.²²⁴ Unsurprisingly, corporate donations were the bulk of the funding of the three main parties — the Brazilian Democratic Movement party, the

²²¹ Artigo 7, inciso I, da Lei nº 13488/2017.

²²² Artigo 7, inciso II, da Lei nº 13488/2017.

²²³ In addition, caps on corporate donations were quite loose: companies could donate to political parties and candidates up to 2% of their previous year's gross revenue.

²²⁴ For an empirical analysis based on data from the Electoral Superior Tribunal, see Carazza, 'Interesses Econômicos, Representação Política e Produção Legislativa no Brasil sob a Ótica do Financiamento de Campanhas Eleitorais' 48. Although the author technically uses the term 'legal fictions' in the chart, they basically mean 'corporations' since companies were the ones who were legally able to donate, which is inferred by the author throughout his thesis. For a discussion about the legal hegemony of corporations in the former Brazilian political finance system, see Min Luiz Fux, STF, ADI 4650/DF, Inteiro Teor do Acórdão 55.

Brazilian Social Democratic Party, and the Workers' Party.²²⁵ For instance, corporate donations accounted for 76% of Brazilian political party and candidate funding in the 2014 general elections.²²⁶

Moreover, there were no de facto spending limits. As Supreme Court's Justice Luiz Fux pointed out during the deliberation of the *ADI 4650* in 2015, per capita spending on Brazilian campaigns back then surpassed the ones in France, Germany and the United Kingdom. And, as far as the ratio between the campaign costs and GDP²²⁷ is concerned, Brazilian campaigns were more expensive than the ones in the United States.²²⁸

For Mr Fux, who led the Court's majority in the *ADI 4650* case, the above-mentioned context could be characterised as a 'plutocratisation' of the political process.²²⁹ What perhaps Justice Fux and others tried to say is that the political process could be characterised as plutocratic because dependent and war chest corruption apparently occurred. In other words, *apparently most candidates felt they were dependent on corporate money, and the balance of political deliberation was distorted in favour of those parties and candidates aligned with business interests.*

²²⁵ Carazza, 'Interesses Econômicos, Representação Política e Produção Legislativa no Brasil sob a Ótica do Financiamento de Campanhas Eleitorais' 59. It is true that, until 2002, corporate donations were not the major source of the Workers' Party's electoral fund. In the 1998 elections, for example, corporate donations accounted for about 35% of the party's fund; while almost 50% came from donations from individuals. However, back then the Workers' Party was a mid-sized party: it had never won a presidential election and was a mid-sized party in the Chamber of Deputies. It was only in the 2002 elections, when corporate donations accounted for around 70% of the Workers' Party electoral fund, that the party became a more dominant force: it won the presidential election for the first time in history and became the party with most seats in the Chamber of Deputies, also for the first time (not to mention an increase of about 75% in the Senate seats). In sum, the Workers' Party only became dominant after it started receiving most of its funds from corporations. See *ibid* 58–60. It should be noted that, in contrast to the British Labour Party, the Brazilian Workers' Party never had formal funding links with trade unions. Kucinski, 'The Rise of the Worker's Party' 19.

²²⁶ Carazza, *Dinheiro, Eleições e Poder: As Engrenagens do Sistema Político Brasileiro*, 43.

²²⁷ Gross domestic product.

²²⁸ STF, *ADI 4650/DF*, Inteiro Teor do Acórdão 25.

²²⁹ *Ibid* 4. Justice Marco Aurélio Mello, who had an important influence on the decision of the majority of the Court, also stated that the Brazilian system could be characterised as a plutocracy. See *Ibid* 171. Mr M Mello based most of his opinion on Timothy K Kuhner, 'The Democracy to Which We Are Entitled: Human Rights and the Problem of Money in Politics' (2013) 26 *Harvard Human Rights Journal* 39.

From the eleven justices of the Supreme Court, only three (Luís Barroso, Teori Zavascki and Gilmar Mendes) made arguments related to *quid pro quo* corruption. Their arguments were not central to the majority's reasoning — Justices Zavascki and Mendes were part of the dissent; and Justice Barroso was part of the majority and followed, for the most part, the central arguments made by Justices Fux and Marco Aurélio Mello. For Mr Barroso, who advanced a view that many in the media seem to hold, the corporate political finance system (combined with the Brazilian electoral system and the system of government) stimulated *quid pro quo* corruption.²³⁰ If we assume that this is true, perhaps we may say that, when it comes to political finance, this occurred because the legislation ended up allowing concentration of donations, as will be explored in chapters seven and eight.

3.4.2. The system with mixed sources

In the 2018 elections, party and candidate financial resources came from public funding, individual donations and the use of candidates' own resources. Moreover, Brazilian federal elections had de facto spending limits for the first time.

As we have seen in the last section, congressmen recently created the 'Special Fund for Campaign' to add up to the 'Parties Fund'. Consequently, public funding

²³⁰ Min Luís Barroso, STF, ADI 4650/DF, Inteiro Teor do Acórdão 121–134. Mr Barroso argued that *quid pro quo* corruption practices related to political finance in Brazil are boosted by an element of the Brazilian political culture: patrimonialism. Patrimonialism occurs when a public authority, such as an elected politician, treats the state (eg, his public office) as if it were his own property. See Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil*, 179. The use of the term in the scholarship about Brazilian political culture was consolidated through the works of scholars such as Raymundo Faoro and Sérgio de Holanda. See Raymundo Faoro, *Os Donos do Poder: Formação do Patronato Político Brasileiro* (3 edn, Editora Globo 2001 (1957)) and Sérgio Buarque de Holanda, *Raízes do Brasil* (2 edn, Editora José Olympio 1948 (1936)). Although most of the scholars who research Brazil have been assuming that Brazilian politicians indeed have a patrimonial element in their practices, some have opposed it: see, eg, Jessé Souza, *A Tolice da Inteligência Brasileira: ou como o País se deixa manipular pela elite* (LeYa 2015). I will avoid this controversy and develop this thesis without addressing the alleged 'genesis' of the Brazilian politicians, since this is usually a complex task designated to historians and sociologists.

represented 73% of the candidates' total financial funding in the first round of the 2018 elections.²³¹ As Brazilian parties have low intra-party democracy,²³² some have argued that this new configuration has eventually benefited those who have close relations with party leaders.²³³ Although public funding was the hegemonic source in the 2018 elections, perhaps it is still too soon to claim that this new configuration is a 'system based on public funding' because we do not know if this proportion will remain the same in the next elections.

In addition, the mixed system also continued to benefit the wealthy in the 2018 elections. By keeping the above-mentioned private money criteria, the Supreme Court and the political bodies enabled economic inequalities to be translated into political inequalities, which is always problematic for a country that is the 14th most unequal in the world.²³⁴

In other words, by force of law, wealthy individuals continued to have the privilege of being able to donate more than poorer ones. The criterion chosen by legislators ended up prohibiting a poorer individual from donating the same amount as someone wealthier, even if she had the resources. For example, if two individuals, on the year before the election, had an income of R\$ 100 thousand and 20 thousand respectively, a donation of R\$ 5 thousand was lawful to the richer individual, but not for the poorer one. In this perspective, the legislation still enabled owners of large

²³¹ Ranier Bragon and Camila Mattoso, 'Com 73% de dinheiro público, primeiro turno custou R\$ 2,82 bilhões' *Folha de S. Paulo* (14 October 2018) <<https://www1.folha.uol.com.br/poder/2018/10/com-73-de-dinheiro-publico-primeiro-turno-custou-r-282-bilhoes.shtml>> accessed 06 January 2019.

²³² See, eg, Amaral, 'As Transformações na Organização Interna do Partido dos Trabalhadores entre 1995 e 2009. Diogo Rais argues that members have little or no protection before the decisions of the party leaders. Diogo Rais, 'Liberar o autofinanciamento deverá elitizar as candidaturas' *Folha de S. Paulo* (17 February 2018) <<https://www1.folha.uol.com.br/poder/2018/02/liberar-o-autofinanciamento-devera-elitizar-as-candidaturas.shtml>> accessed 17 June 2018.

²³³ Reynaldo Turollo Jr, 'Divisão de fundo eleitoral privilegiará os caciques, admitem partidos ao TSE' *Folha de S. Paulo* (24 July 2018) <<https://www1.folha.uol.com.br/poder/2018/07/divisao-de-fundo-eleitoral-privilegiara-os-caciques-admitem-partidos-ao-tse.shtml>> accessed 24 July 2018.

²³⁴ World Bank Development Research Group, 'GINI index (World Bank estimate) (1981–2013)' <<http://data.worldbank.org/indicator/SI.POV.GINI>> accessed 30 July 2016.

companies to donate a significant amount of money (not through their corporations, but as individuals). For example, a millionaire who earned USD 20 million could donate USD 2 million. In this respect, it is worrying to hear reports of corporation directors bundling to donate as a group in the 2018 elections.²³⁵

Wealthy candidates also had more chance of competing effectively in the last election because they could use their own financial resources up to the spending limits established for the position to which they were competing — which were quite high, as we saw in the last section.²³⁶

Even considering that the 2018 election was atypical due to an unprecedented knife attack during the campaign that boosted the election's anti-system traits, apparently money continued to be important, as early analyses have been showing.²³⁷

Finally, it should be noted that there are ongoing investigations about the occurrence and the legality of third-party expenditures allegedly made by corporations and businessmen, such as the alleged dissemination of paid messages through WhatsApp in order to favour Bolsonaro.²³⁸

²³⁵ Ranier Bragon and Camila Mattoso, 'Dirigentes de empresas fazem doações e ajudam a eleger 53 parlamentares' *Folha de S. Paulo* (14 October 2018) <<https://www1.folha.uol.com.br/poder/2018/10/dirigentes-de-empresas-fazem-doacoes-e-ajudam-a-eleger-53-parlamentares.shtml>> accessed 17 January 2019.

²³⁶ Political bodies have been discussing the introduction of uniform limits for individuals' donations and use of own resources by candidates. But the rules for the 2022 federal elections are still uncertain, since elected politicians and the Superior Electoral Tribunal have constantly changed the electoral legislation from one election to another.

²³⁷ For instance, Carazza's analysis using data separated by party and state indicates that, in general, the candidates with more money were more likely to be elected during the 2018 elections. Bruno Carazza, 'Onda antissistema que varreu o Congresso também se deve a novas regras' *Folha de S. Paulo* (14 October 2018) <<https://www1.folha.uol.com.br/ilustrissima/2018/10/onda-antissistema-que-varreu-o-congresso-tambem-se-deve-a-novas-regras.shtml>> accessed 17 January 2019.

²³⁸ See, eg, Ricardo Della Coletta, 'TSE e PF vão investigar se empresas bancaram esquema ilegal pró-Bolsonaro no WhatsApp' *El País* (20 October 2018) <https://brasil.elpais.com/brasil/2018/10/19/politica/1539978047_019665.html> accessed 17 January 2019.

3.5. Conclusion of the chapter

From 1993 to 2015, Brazil had a political finance system based on corporate donations. It seems safe to say that, within this period of six federal elections,²³⁹ war chest and dependence corruption apparently occurred, harming equality of opportunity and risking the integrity of elected politicians, respectively.

A decision from the Supreme Court in the *ADI 4650* and the enactment of recent legislation has changed the legal framework, although the new system based on mixed sources of funding continued to allow economic inequalities to be translated into political inequalities in the 2018 elections.

The next part of the thesis will investigate, through a case study, whether the political finance system based on corporate donations impacted the democratic integrity of a branch of law that grounds the country's capitalism: the competition law.

Considering that there is debate as to whether corporate donations should be re-introduced,²⁴⁰ the following case study remains topical.

²³⁹ 1994, 1998, 2002, 2006, 2010 and 2014 federal elections.

²⁴⁰ See footnote 52.

Part B

The implications of the Brazilian political finance system for competition law

Chapter Four

The sufficiency of appearance in matters concerning political finance corruption

4.1. Introduction

In a recent survey of thousands of citizens of 18 Latin American countries, Brazilians were the ones who expressed the lowest rate of trust in their elected representatives: 86.1% of Brazilians perceive that their country is governed for a *few powerful groups in their own interest*; and only 11.7% perceive that the country is governed for the good of all people. By contrast, in Uruguay, 38.2% of the population perceive that the country is governed for a few powerful groups in their own interest, while the majority of Uruguayans (55.2%) perceive that the country is governed for the good of all people.²⁴¹

As I will argue in this chapter, a great deal of the people's lack of confidence in their representatives has to do with a lack of confidence in the *electoral process*.

The other main argument of this chapter is: lack of confidence in the electoral process not only harms confidence in representatives, but also might *impair confidence*

²⁴¹ Latinobarómetro, '2015 Database' <<http://www.latinobarometro.org>> accessed 22 July 2018.

in the rules they set regarding the country's capitalism and confidence in the integrity of the enforcement of those rules.

This chapter is important to set the theoretical basis for matters involving political finance corruption, before exploring the implications of those forms of corruption for competition law. In other words, before addressing the case studies which will empirically explore the implications of political finance corruption on competition law (which will follow in chapters five and six), we need to know the parameters for matters involving political finance issues and the consequences of these parameters.

The present chapter is structured as follows. In the first section, I will try to demonstrate that, according to the Brazilian Supreme Court, the mere *appearance* of electoral corruption is sufficient to justify changes in political finance legislation.

In the second section, I discuss why is this so. That is, I will try to answer why mere appearance is enough to justify changes in legislation.

In the last section, I will argue that the appearance of dependence and war chest corruption might also result in the appearance of corruption of the rules of capitalism. Thus, the appearance of electoral integrity is key not only for the country's democracy, but, more broadly, for the capitalist democracy set out in the Brazilian constitution.

4.2. The sufficiency of appearance in matters involving political finance law in Brazil

As we have seen in chapter three, the majority of the Brazilian Supreme Court has recently ruled that the political finance system based on corporate donations violated the Constitution.

The majority's arguments implied that the *appearance* of dependence and war chest corruption is sufficient to validate changes in political finance legislation.²⁴² The justices did not examine political science literature while deciding the case. A small amount of data on campaign finance was enough to convince the justices that corporate donations were corrupting the electoral process — either by risking the elected politicians' decision-making integrity towards the public or apparently harming the equality of opportunity.

4.2.1. The appearance of dependence corruption

Justice Fux, who delivered the leading opinion of the majority, concluded that corporate donations have had an anti-republican intent because *many of the largest donors contributed to all the main parties simultaneously*.²⁴³ In other words, the donations *intended to build political connections*, indicating a corrupting feature in the sense of harming the integrity of elected politicians' decision making.

And that was enough for him. Mr Fux did not discuss if there were studies showing whether corporate donations have *actually* corrupted the politicians' decision making, that is, if there was evidence that corporate donations have indeed shaped the minds and attitudes of elected politicians. The apparent intent of corrupting was enough. The other justices who formed the majority — for example, Marco Aurélio Mello, who also played an influential role for the majority's decision²⁴⁴ — concurred in expressing the same interpretation.

The majority of the High Court of Australia took a similar path in *McCloy v New South Wales*, when it ruled that 'removing the risk and *perception* of corruption'

²⁴² STF, ADI 4650/DF.

²⁴³ Ibid, Inteiro Teor do Acórdão 53.

²⁴⁴ Ibid 174.

(including of dependence corruption) is a constitutionally valid justification for enacting political finance legislation.²⁴⁵

4.2.2. The appearance of war chest corruption

The Brazilian justices also did not examine empirical studies in depth to find the unconstitutionality of corporate donations due to war chest corruption (that is, due to an imbalance in the political debate in favour of those parties and candidates aligned with business interests).

Justice Fux concluded that corporate donations have distorted competition in elections based on the fact that (a) *a few companies provided a large amount of the total funds of the elections*, (b) *candidate and party spending have been rising beyond inflation and GDP*, and (c) *there is a strong correlation between the amount of money spent on campaigns and the votes hoarded by candidates*.²⁴⁶ For Mr Fux, this was sufficient to conclude that the overwhelming amount of corporate money in elections benefits the candidates aligned with business interests, unbalancing the electoral competition between candidates, and impacting results. He did not consider, for instance, that the ‘strong correlation between money and votes’ might be explained by the fact that a candidate might have attracted corporate money because of his well-known ability to win votes and get elected; and not the opposite (see subsections 5.4.1 and 5.4.2).

²⁴⁵ *McCloy v New South Wales* at 66 [93] (emphasis added). In paragraph 62, the majority of the Court reasoned that ‘Limiting restrictions on political donations to *acts of bribery* would undoubtedly reduce the efficacy of the statutory scheme. The difficulties inherent in detecting and proving bribery in the context of political donations do not suggest that it can be considered a reasonable alternative to capping. Further, *it is not the subjective intention of the donor so much as the objective tendency of large payments of money to corrupt both government and the electoral system* which is the justification for the restriction.’ (emphasis added). The legislation discussed by the High Court of Australia concerned a cap on political donations, a prohibition to property developers from making such donations, and a restriction on indirect campaign contributions.

²⁴⁶ ADI 4650/DF, Inteiro Teor do Acórdão 50. Justice Weber used the same argument. Ibid 302.

The other justices who formed the majority adopted a similar view. For Mr Toffolli, it was *self-evident* that,

Authorizing the influence of business on the electoral process is to concede the breach of equality in electoral disputes and the imbalance in the election, since it is undeniable that candidates and political parties with greater ability to raise funds from the interest groups with greater economic power have more chances of winning the elections.²⁴⁷

The opinions of Justices Marco Aurélio Mello²⁴⁸, Ricardo Lewandowski²⁴⁹ and Joaquim Barbosa²⁵⁰ were in this same vein.

No justice discussed in depth *if corporate donations did in fact favour certain political parties or candidates, and which ones, by impacting the voters' decision-making*. Therefore, again, the mere *appearance* of an imbalance in electoral competition was enough to find unconstitutionality.

The Supreme Court of Canada took a similar view in *Harper v Canada (AG)*,²⁵¹ as will be seen in the next section.

²⁴⁷ Ibid 84.

²⁴⁸ Ibid 171

²⁴⁹ Ibid 178.

²⁵⁰ Ibid 64.

²⁵¹ 2004 SCC 33, [2004] 1 SCR 827.

4.3. Why is the mere appearance enough?

To answer in one sentence the question formulated at this section's title, we can summarise that appearance is enough because: although *citizens need to maintain confidence in the electoral process*, dependence and war chest corruption are *difficult to measure scientifically*.

Thus, in this section, we will first look at the difficulty in measuring dependence and war chest corruption. Subsequently, we will explore why it is important that people trust elections. Next, how political finance regulation may increase public confidence in the democratic regime will be discussed. Lastly, I will try to delimitate the meaning of an 'appearance based on logic, reason and social science evidence' as sufficient to justify political finance reforms.

4.3.1. The difficulty in measuring dependence and war chest corruption

Dependence corruption is hard to measure scientifically because of the difficulties in asserting that money was *the sole* factor that altered the decision-making of an elected politician. In other words, it is difficult to isolate money from other factors that might have contributed to the elected politician's change of mind. It is unlikely that an elected politician will publicly admit that he felt dependent on the campaign contribution while taking a decision in government or in Congress. Moreover, politicians might even lack self-awareness: sometimes they might have the feeling [of dependency] but not realise it. This difficulty in measuring dependence corruption becomes even harder when dealing with a large number of representatives, such as the whole Congress. As it will be seen in chapter five, statistical studies might try to control for other factors (such as ideology), but they have relied on somewhat imprecise approximations (for

instance, they have determined a politician's ideology based on his party, and not his ideology as an individual), which may undermine the confidence in the results.

War chest corruption, in turn, is hard to measure scientifically due to the difficulty in determining the extent to which people were in fact influenced by political ads. As put by Justice Michel Bastarache, while writing for the majority of the Supreme Court of Canada in *Harper v Canada (AG)*, the harm of wealth monopolising the political discourse 'is difficult, if not impossible, to measure because of the subtle ways in which advertising influences human behaviour'.²⁵²

It is noteworthy that similar problems might arise when trying to draw causation between media content and electoral results. As argued by Nadia Urbinati:

Although we can hardly prove beyond any reasonable doubt that there is a causal relationship between media content, public opinion, and political results or decisions (no data can prove that Berlusconi won three electoral competitions because of his media television empire), the barriers to equal opportunity to participate in the formation of public opinions should be kept low and their level permanently monitored.²⁵³

4.3.2. The importance of public confidence in elections

The survival of the democratic regime depends on the people's confidence in it. If people do not trust democracy, this can open possibilities for the rise of non-

²⁵² at 79.

²⁵³ Nadia Urbinati, 'Free Speech as the Citizen's Right' in Robert C Post (ed), *Citizens Divided: Campaign Finance Reform and the Constitution* (The Tanner Lectures on Human Values, Harvard University Press 2014) 139.

democratic political regimes.²⁵⁴ The erosion of constitutional liberal democracy may be gradual and start with the public support for candidates who flirt with authoritarian regimes and fight against some of the constitutional liberal democracy's pillar institutions, such as the free press and the judiciary.²⁵⁵ This is even more worrying in countries with a recent past of authoritarianism, such as Brazil, where not too long ago a military dictatorship was in force.²⁵⁶

The cornerstone of representative democracy is elections. This is why citizens need to maintain confidence in elections. In this aspect, the majority of the Supreme Court of Canada reasoned in *Harper v Canada (AG)* that lack of confidence in the electoral process (1) *discourages citizens from participating in a meaningful way in democracy* and, perhaps more importantly, (2) *results in lack of faith in elected representatives*. If elections *apparently* lack integrity, trust in representative democracy falls. As a result, alternative (non-democratic) political regimes might have more opportunities to arise.

Within the Brazilian Supreme Court, Justice Fux inferred that same rationale when he argued that citizens should trust and believe in the political system of the Brazilian constitutional democracy.²⁵⁷

²⁵⁴ I must register that I had the insight for this argument while listening to Politiquês Nexo Jornal podcast, 'Democracia no Brasil e no mundo: conceitos, avanços e ameaças' (23 September 2018) comments by Heloisa Starling, history professor at Federal University of Minas Gerais <<https://www.nexojornal.com.br/podcast/2018/09/23/Democracia-no-Brasil-e-no-mundo-conceitos-avan%C3%A7os-e-amea%C3%A7as>> accessed 14 February 2019.

²⁵⁵ What we are talking here, more precisely, is about the Brazilian *constitutional liberal democracy*. I take a 'constitutional liberal democracy' as a country where there are: (1) 'periodic free-and-fair elections in which a losing side cedes power'; (2) 'liberal rights to speech and association that are closely linked to democracy in practice'; and (3) 'stability, predictability, and integrity of law and legal institutions — the rule of law — functionally necessary to allow democratic engagement without fear or coercion'. Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review.

²⁵⁶ See chapter two for a brief account of the Brazilian historical context.

²⁵⁷ STF, ADI 4650/DF, Inteiro Teor do Acórdão 25.

And, for Mr Fux, *a political finance legal framework that permits the capture of political power by economic power*,²⁵⁸ *attempts against that trust*. As I have been arguing throughout this thesis, the so-called “capture of political power by economic power” can happen both through corruption of the elected politician’s attitude or through corruption of the election’s flow of communication. In other words, it can occur through *quid pro quo* and dependence corruption; or through war chest corruption.

Because we are talking about trust, the mere appearance is enough.

4.3.3. How political finance regulation may increase public confidence in the democratic regime

Talking about dependence corruption within American politics, Lawrence Lessig argued that money in the wrong places makes people trust less.

He argued that the judicial system protects itself from distrust by avoiding the appearance of conflicts-of-interest. For example, he says, if a judge deciding a billion-dollar lawsuit brought against Exxon has any financial connection with the corporation, however small, that is enough to disqualify her from that suit.

Therefore, as Lessig puts it,

The legal system doesn’t assume that a judge is partial merely because her “impartiality might reasonably be questioned.” But it does assume that the fact that her “impartiality might reasonably be questioned” will affect people’s trust of the judicial system. And so to protect the system,

²⁵⁸ Ibid 51.

or, more precisely, to protect trust in the system, the system takes no chances.²⁵⁹

Indeed, ‘financial connection’ has been widely recognised in several countries as a cause for disqualification when it comes to the judiciary. For instance, in the United Kingdom, while deciding if a judge was apt for hearing a case (considering that he had previously given advice, in his capacity as a solicitor, to parties who would benefit from the case’s decision), Lord Denning MR ruled that:

The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: ‘The judge was biased’.²⁶⁰

In Brazil, several forms of financial links lead to a judge’s disqualification, as established in article 144 of the Code of Civil Procedure.²⁶¹ The legislation does not take risks. It simply forbids these financial connections, in order to protect the judicial system.

In sum, the judicial system protects itself from the *appearance* of a corrupted decision. And, in this fashion, so should the political system.²⁶²

²⁵⁹ Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*, 30.

²⁶⁰ *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 599.

²⁶¹ Lei n° 13105, de 16 de março de 2015, DOU 17/03/2015.

²⁶² Aside from the protection of the democratic and judicial systems, Lessig argues that in practice we also adopt a similar rationale to other things that are of great value to us. For instance, if you find out that a school bus driver has been charged with drunk driving, you are going to hesitate before letting

However, in my view, Lessig's argument should be expanded a bit more. Political finance regulation should protect against lack of trust not only regarding dependence corruption (as argued by Lessig), but also from war chest corruption. Those citizens who perceive that overwhelming corporate money in elections dominates the flow of communication will distrust elections as they would if they had the perception of dependence corruption. Here, the problem is not the corruption of the elected politician's attitude; but instead the corruption of the political debate.

Protection from an appearance of war chest corruption was precisely the point made by Justice Bastarache while writing for the majority of the Supreme Court of Canada in *Harper v Canada (AG)*. As he pointed out, war chest corruption harms both *listeners* and *potential speakers*:

The [spending] limits also prevent the possibility that the wealthy can dominate the electoral discourse and dictate the outcome of elections. (...) Thus, third party advertising expense limits advance the *perception* that access to the electoral discourse does not require wealth to be competitive with other electoral participants. *Canadians*, in turn, *perceive the electoral process as substantively fair as it provides for a reasonable degree of equality between citizens who wish to participate in that process.*²⁶³

your child should get on his bus. As Lessig puts it, 'even if you think the charge is likely false, the mere chance that it is true may well be enough (and rationally so) for you to decide to drive your kid rather than risk his life on the bus'. The charge will not lead you to think that the driver is guilty, but it will make you think about whether it is sensible to let him drive your child. In other words, you will not want to take the risk because your child's life is too valuable to you. Therefore, although the driver's guiltiness has not been accessed, the mere lack of trust will change your attitude. Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*, 30.

²⁶³ At para 109 (emphasis added). John Rawls made a similar argument when commenting that the United States Supreme Court's decision in *Buckley v Valeo* failed to recognise the importance of the

In other words, protecting the electoral system from the perception of war chest corruption stimulates non-wealthy *people to participate as speakers* and even *run for office*. Furthermore, it stimulates everyone, including *listeners*, to trust that the election was *fair* and, thus, to have *more confidence* in their elected representatives.²⁶⁴

To summarise my claim: both forms of corruption (dependence and war chest) undermine trust in the democratic system. The mere presence of money suggesting potential outcomes (either representatives' dependence or candidates' overwhelming advantage in elections) affects people's trust in the electoral process and, consequently, in the elected representatives. Consequently, the preservation of the constitutional democratic regime gets threatened, either by non-democratic practices or even eventually by the implementation of a non-democratic regime. In sum, as with the judicial system, what is at stake here (the democratic system) is too valuable for the Constitution, so it should be protected as such.

4.3.4. The sufficiency of appearance based on logic, reason and social science evidence

We have just seen that the appearance of political finance corruption is enough to justify reforms to legislation. That said, the affirmation of what is 'apparent' must be grounded on good reasoning²⁶⁵ from some social science evidence.

protection from the appearance of war chest corruption. Rawls, 'The Basic Liberties and their Priority' 76.

²⁶⁴ It should be noted that, even if those who perceive elections as unfair end up voting for anti-business candidates, they might still not trust elected representatives: they might think that several potential candidates did not eventually dare to compete because of lack of proper financial resources. In this sense, those people might still have the perception that the result was unfair.

²⁶⁵ As argued by the majority of the Supreme Court of Canada, given the difficulties in measuring the harm of war chest corruption, '*a reasoned apprehension* that the absence of third-party election

War chest corruption

An example of good reasoning on apparent war chest corruption comes from the majority of the Supreme Court of Canada, in *Harper v Canada (AG)*. Given the difficulties in scientifically measuring the extent to which money influences public opinion, the majority allowed themselves to rely on ‘logic, reason and some social science evidence’, as the Court worked in several cases.²⁶⁶ For example, the majority reasoned that ‘surely, political parties, candidates, interest groups and corporations for that matter *would not spend a significant amount of money on advertising if it was ineffective*’.²⁶⁷

Dependence corruption

An example of good reasoning involving dependence corruption, in turn, was articulated by Justice Fux, when he argued that the fact that many of the largest corporate donors made simultaneous contributions to all main political parties indicated a corrupting intent in the sense of building connections with elected politicians, and, as such, an attempt to affect their behaviour during the term of office.²⁶⁸

advertising limits will lead to electoral unfairness *is sufficient*’. *Harper v Canada (AG)* at para 88 (emphasis added). A reasoning is ‘any process of drawing a conclusion from a set of premises’. Good reasoning occurs when ‘the premises support or even entail the conclusion drawn’. Simon Blackburn, ‘Reasoning’ in Simon Blackburn (ed), *The Oxford Dictionary of Philosophy* (Oxford University Press 2008). Good reasoning involves logic, which is ‘the general science of inference.’ Simon Blackburn, ‘Logic’ in Simon Blackburn (ed), *The Oxford Dictionary of Philosophy* (Oxford University Press 2008).

²⁶⁶ At para 77.

²⁶⁷ Ibid at para 106 (emphasis added).

²⁶⁸ ADI 4650/DF, Inteiro Teor do Acórdão 53.

4.4. The appearance of corruption of the rules of the economic system

The problem of appearance of dependence and war chest corruption has an additional dimension: it may result in the appearance of corruption of the rules of capitalism.²⁶⁹

Like most western countries today, Brazil is a constitutional capitalist democracy. In a constitutional capitalist democracy, political institutions set the infra-constitutional rules of the economic system and even, sometimes, amend the constitutional ones.²⁷⁰ Consequently, political finance corruption has the potential to harm not only the people's confidence in political institutions, but also in capitalism itself.

In addition, the rules of capitalism can be enforced by the government, state bodies and regulatory agencies, or the judiciary. In this sense, there is no question that apparent political finance corruption can harm the appearance of integrity of the rules that are *enforced directly by the government itself*. Nonetheless, they can also harm the appearance of integrity of rules enforced by *other institutions*, considering that these are usually under *democratic control* — for instance, the government might be responsible for appointing the agency's top officers and/or setting its budget.

Therefore, the appearance of election integrity may be essential not only to maintain people's confidence in the democratic system, but also more broadly in the *capitalist democracy* established by the Constitution.

²⁶⁹ For an account of how the corruption of American democracy might have led to the corruption of that country's capitalism, see, generally, Timothy K. Kuhner, *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Stanford University Press 2014).

²⁷⁰ In Brazil, Congress also can amend the Constitution, as long as this amendment does not violate any of the immutable clauses of the Constitution. However, the legislative process to amend the Constitution is stricter than the one regarding the infra-constitutional law. Constituição da República Federativa do Brasil, 1988, artigo 60.

4.5. Conclusion of the chapter

We have seen that the majority of the Brazilian Supreme Court has implied that the ‘appearance’ of dependence and war chest corruption are sufficient justifications for political finance reform; and that the Australian and Canadian Supreme Courts have adopted similar reasoning in landmark decisions.

The reasoning behind those decisions is basically the following: considering that *citizens need to maintain confidence in the electoral process* to encourage the continuation of the democratic system itself; but that dependence and war chest corruption, which harm that confidence, are *hard to measure scientifically*; it follows that changes in legislation in order to strike the *appearance* of those forms of corruption are constitutionally valid. Nevertheless, statements on what is ‘apparent’ must be made on reasonable grounds and be based on some social science evidence.

I have argued that the appearance of dependence and war chest corruption might also potentially result in the appearance of corruption of the rules of capitalism because elected politicians are the ones who formulate many of those rules and have great influence on determining who will enforce them and how.

In this sense, the next two chapters will implement case studies on whether the appearance of political finance corruption has impacted the confidence we should have in the democratic integrity of the rules governing one of the key elements of capitalism: economic competition related to antitrust law and its enforcement.²⁷¹

²⁷¹ Please note that I am not discussing here the hypothetical lack of confidence in capitalism itself, but rather the lack of confidence in the rules set for capitalism in the country, and how they are enforced. Nor I am arguing that competition law should be more or less interventionist. This is a controversial issue to be discussed by the society, the legislative and the executive.

Chapter Five

The impact of corporate donations on the Competition Act 2011

That's the way it is. Somebody gives them money. Not anything wrong, just psychologically, when they go to that person, they're going to do that, (...) They owe them, and by the way, they may therefore vote negatively towards the country.

Donald Trump²⁷²

Let's not insult the intelligence of the American people. People aren't dumb, (...) Why in God's name does Wall Street make huge campaign contributions? I guess just for the fun of it, they want to throw money around.

Bernie Sanders²⁷³

5.1. Introduction

Both speeches above illustrate a view that many people around the world currently hold: contributions and expenditures in elections result in political benefits for the donor or the third-party spender.

²⁷² Eugene Scott, 'Trump on public financing: 'I don't know yet'' *CNN* (17 January 2016) <<http://edition.cnn.com/2016/01/17/politics/donald-trump-public-financing/>> accessed 22 November 2016.

²⁷³ Hunter Walker, 'Hillary Clinton and Bernie Sanders spar over super-PACs and megadonors' *Yahoo News* (12 February 2016) <<https://www.yahoo.com/news/hillary-clinton-and-bernie-sanders-spar-over-super-043334749.html>> accessed 22 November 2016.

Public law scholars have turned their attention to the potential corruption of elections and have observed that money in politics may seek not only to *produce* certain government interventions, but also to *prevent* them.²⁷⁴

One possible regulatory area that business elites might try to produce or prevent is antitrust. And, when dealing with this matter, perhaps the first thing some corporations might want to influence is the enactment of an antitrust legislation.

The present chapter will try to investigate whether campaign finance has impacted Brazil's antitrust legislation, by exploring social science evidence; and reflecting on it.

This is not a simple task, however. Firstly, because the data is precarious. Data on campaign finance only began to be published online after 2002.²⁷⁵ This leaves us to examine the sole major antitrust legislation enacted after that: The Competition Act 2011.

A second limitation is that the Competition Act 2011 was approved in Congress through an agreement between party leaders.²⁷⁶ Therefore, it is not possible to know how each congressman voted. This rules out the possibility of implementing a statistical study to investigate the correlation between money and votes in Congress.

²⁷⁴ See, eg, Kuhner, *Capitalism v. Democracy: Money in Politics and the Free Market Constitution*, 251. Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press 2014) 145.

²⁷⁵ Political scientist David Samuels has a database of the 1994 and 1998 elections, but this is useless for us. The congressmen who participated in the legislative process of the Competition Act 1994 (the former antitrust legislation) were elected in 1986 and 1990. Moreover, those congressmen did not receive any donations from corporations, at least not on books, because they were not elected under the corporate political finance system: corporate donations became legal only after 1993.

²⁷⁶ The core of the bill was approved through an agreement of party leaders, with only two amendments being put to the vote in the plenary. Those amendments do not clearly or directly relate to more or less antitrust intervention.

Considering the limitations above, the present chapter will implement a case study²⁷⁷ to make an in-depth investigation on the legislative process of the Competition Act 2011. It will try to draw insights on whether the corporate political finance system, which was in force between the 1994 and 2014 federal elections, had any impact on the lawmaking of the Act. The focus will be on the amendments proposed, which shaped the text of the legislation.

The chapter is organised as follows. Section 5.2 looks at Congress' records, academic literature and press archives; and finds that business elites consistently monitored and tried to influence the outcome of competition bills; and that the hegemonic lobbying was for a *less* interventionist legislation.

In section 5.3, I claim that the hegemonic lobbying for less intervention continued during the legislative process of the Competition Act 2011. And, looking at campaign finance data and congressional records, I find that the more money a congressman received from companies that had been a defendant in an antitrust case, the more he tended to be concerned about *excessively* punishing companies for anticompetitive practices while proposing amendments to the consolidated version of the competition bill.

In section 5.4, I then try to understand the pattern found through four angles: corruption of the congressmen's attitude, war chest corruption, the possibility of a mere coincidence, and the nature of the houses of Congress.

I will try not to overclaim and, as such, I will not make any claim about causation. Drawing causal inferences when investigating politics is particularly difficult

²⁷⁷ I take case study as 'a strategy for doing research which involves an empirical investigation of a particular phenomenon within real life context using multiple sources of evidence'. Colin Robson, *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (Blackwell 2002) 178.

because of the complexity of the political world.²⁷⁸ As seen in the last chapter, when it comes to campaign finance it is difficult to isolate money from other factors that caused the politician's attitude and safely affirm that money was the main factor. Likewise, in war chest corruption cases, it is hard to assess the extent to which people were influenced by political ads.

Instead, by shedding light on the legislative process, my aim is to ask: do the data gathered in this chapter *undermine* our ability to believe that corporate donations had nothing to do with a less interventionist Competition Act 2011?²⁷⁹

5.2. The business elites' lobby on competition bills (1945–1994)

To begin with, we must ask whether competition law is relevant for business elites at all. Although the data on lobbying practices is precarious due to lack of regulation in Brazil, lobbying was traditionally corporatist in the country — that is, centred on a business confederation and state federations, with other business associations also playing important roles. Thus, it is possible to look at congressional records, academic literature and press archives to see how those business organisations lobbied on antitrust bills.

5.2.1. The Decree-Law n 7666/45

The country's first competition legislation²⁸⁰ (the Decree-Law n 7666/45) was criticised by business elites.²⁸¹ The National Confederation of Industry (CNI), the

²⁷⁸ For a discussion on causal theories and the complexity of the political world, see Michael Coppedge, *Democratization and Research Methods* (Cambridge University Press 2012) 49.

²⁷⁹ The structure of this question was inspired by the reading of Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*.

Federation of Trade Associations of Brazil, and the Union of Agricultural Associations of Central Brazil sent a note to president Getúlio Vargas repudiating the legislation.²⁸²

They lobbied against what they viewed as *excessive* state intervention:

- The Decree-Law would disrupt companies that create wealth.
- There were no trusts or cartels in the country. Trusts, cartels, and other manifestations of concentrated economic power only existed in ‘super capitalised’ economies, which was not the case in Brazil, according to them.
- Trusts, cartels and agreements were frequent in depressing economies, and the Brazilian economy was prospering at the time.
- The Decree-Law was arguably too restrictive: they argued against merger control, dissolution of companies, expropriation, seizure of documents and ledgers, control of land acquisition by agribusiness, and so on.²⁸³

²⁸⁰ Though prior legislation did establish provisions forbidding cartels, price predatory and bundling practices, these provisions were part of a broad economic criminal law that had other provisions unrelated to competition. Decreto-Lei nº 869, de 18 de novembro de 1938, DOU 21/11/1938. The Decree-Law of 1945 was the first legislation to have provisions concerning only competition. Moreover, it created a Brazilian competition authority, and introduced merger review.

²⁸¹ Decreto-Lei nº 7666, de 22 de junho de 1945, DOU 22/06/1945.

²⁸² The full opinion is available at Edgard Carone, *A Terceira República (1937–1945): Documentos* (Difel 1976) 369. According to Francisco Corsi, president Getulio Vargas enacted the Decree-Law in order to get closer to workers, since he felt he was becoming politically isolated. Francisco Luiz Corsi, 'O Fim do Estado Novo e as Disputas em Torno da Política Econômica' (1996) 6/7 *Revista de Sociologia e Política* 30.

²⁸³ They also argued that there was already a criminal legislation (Decreto-Lei nº 869/38), which established the ‘attacks against free competition’ as a crime, and nobody was ever condemned within that legislation at that time. In addition, those associations complained they were not heard about the bill; and stated that, although the producing classes were not against the idea of an ‘antitrust law’, the Decree-Law differed from the United States’ antitrust law (therefore, they proposed an alternative version of the antitrust bill).

In addition, several media companies reportedly criticised the provision which established a pre-merger notification system for the sector (article 8).²⁸⁴ Foreign companies, in turn, complained that the legislation was protectionist. The United States' Ambassador in Brazil even reportedly sent president Vargas a telegram.²⁸⁵

Arguably, business elites' disapproval was one of the factors that influenced president Vargas' removal from office in October of that same year.²⁸⁶ With Vargas out of office, the legislation was revoked a month later. Brazil's first competition legislation, thus, was in force only for three months.²⁸⁷

5.2.2. The Competition Act 1962 (Law n 4137/62)

In 1948, a new competition bill was presented (n 122/48). Corporate elites lobbied against it, according to congressional records.

The Federation of Industries of the State of Pernambuco (FIEPE), the Trade Association of Pernambuco (FACEP) and the Federation of Wholesale of the Eastern Northeast promptly filed a brief, arguing that the bill intended to transform industries 'into slaves of the political power [that is, the government]'.²⁸⁸ Similarly, the Trade

²⁸⁴ Othon Jambeiro and others, 'O Estado Novo, o Rádio e seus Órgãos Reguladores' (2003) 1 Contemporanea : Revista de Comunicação e Cultura 205 215. See, also Heber Ricardo da Silva, *A Democracia Imprensa: Transição do Campo Jornalístico e do Político e a Cassação do PCB nas Páginas da Grande Imprensa, 1945–1948* (Editora UNESP 2009) 111; and Mário André Machado Cabral, 'Primeiro passo na política antitruste brasileira, Lei Malaia completa 70 anos' *Consultor Jurídico* (12 December 2015) <<http://www.conjur.com.br/2015-dez-12/mario-cabral-primeira-antitruste-lei-malaia-completa-70-anos>> accessed 22 November 2016.

²⁸⁵ Corsi, 'O Fim do Estado Novo e as Disputas em Torno da Política Econômica' 32–33.

²⁸⁶ Ibid. See also Francisco Ribeiro Todorov and Marcelo Maciel Torres Filho, 'History of Competition Policy in Brazil: 1930–2010' (2012) 57 The Antitrust Bulletin 207 215. José Linhares, the president of the Supreme Court, acted as temporary president of the Republic for three months; and one of his acts was the revoke of the Vargas' antitrust Decree-Law.

²⁸⁷ Although the legislation was published in June, it came into force in August.

²⁸⁸ Pages 58–66 of the bill's dossier. Câmara dos Deputados, Projeto de Lei nº 122/1948. The Federation of Industries of the State of Pernambuco, the Trade Association of Pernambuco and the Federation of Wholesale of the Eastern Northeast particularly criticised the provisions that would give CADE power to grant or deny licence for export or import of products; and to investigate prices in

Association of Santos (ACS) filed a brief arguing that the bill aimed at economic dirigisme.²⁸⁹ The Federation of Industries of São Paulo (FIESP) also reportedly lobbied against it.²⁹⁰

The bill n 122/48 was discussed for over a year in the Chamber of Deputies' committees, but it was eventually forgotten.²⁹¹ In 1955, a new competition bill (n 3/55) was presented with a similar content, but it also ended up overlooked by congressmen.²⁹²

In 1961, president Janio Quadros proposed another competition bill to Congress, which was again promptly criticised by business elites' associations. The Trade Association of São Paulo (ACSP) published an opinion arguing that:²⁹³

- The Brazilian economy was small. Therefore, it would be impossible/impractical to have a large number of players competing in such small markets.
- The competition bill proposed by Quadros would impede corporations from earning profits, thus blocking future investments.
- Economic freedom would be the best way to achieve social welfare.
- The existent Brazilian criminal legislation was sufficient to inhibit anticompetitive acts.
- The concept of abuse of economic power in the bill was too broad and interventionist.
- They feared political harassment by the state.

relation to production costs for the purpose of determining the maximum limit of these prices and to fix the normal percentage of profit.

²⁸⁹ Pages 9 and 10 of the bill's dossier. Câmara dos Deputados, Projeto de Lei n° 122/1948.

²⁹⁰ FIESP's brief isn't attached in the bill's records at the Congress, but the Trade Association of Santos mentioned that FIESP filed a brief against to the bill as well.

²⁹¹ Vinícius Marques de Carvalho and Carlos Emmanuel Joppert Ragazzo, *Defesa da Concorrência no Brasil: 50 anos* (Conselho Administrativo de Defesa Econômica 2013) 40.

²⁹² Ibid.

²⁹³ The full opinion is available at *O Estado de São Paulo* (São Paulo, 3 May 1961) 21.

- The provisions which established seizure of corporate's books would be an excessive state intervention.
- All competition bills that have been discussed by the parliament (bill n 122/48, bill n 3/55, and the executive's bill) were inadequate.

Likewise, the National Confederation of Commerce (CNC) argued that president Quadros' competition bill was too interventionist.²⁹⁴

- The competition bill constrained basic liberties protected by the Constitution.
- There would be an undue punishment of pro-competitive practices.
- There would be excessive state intervention in the seizure of books and files.
- They feared political persecution and arbitrariness in the enforcement of the legislation by the Brazilian antitrust agency (then named as CADEC), with potential excessive enforcement.²⁹⁵

Finally, press accounts reported that the High Council of the Producing Classes (CONCLAP) argued that Quadros' bill would be a danger to free enterprise, and an obstacle to national development.²⁹⁶

Perhaps at least partially influenced by business' emphatic repudiation of Quadros' bill, congressmen then re-started discussion of bill n 3/55, which was reportedly considered a less interventionist one.²⁹⁷

²⁹⁴ CNC'S full opinion is also available at *O Estado de São Paulo* (São Paulo, 3 May 1961) 21.

²⁹⁵ Thus, they argued that it would be more reasonable to grant the judiciary the power to interpret and enforce the legislation.

²⁹⁶ *O Estado de São Paulo* (São Paulo, 3 May 1961) 21.

²⁹⁷ According to Magalhães, Quadros' bill was 'terrible' because judges would have had the power to order the preventive detention of businessmen and interdict his establishment. Businessmen could then be sentenced to prison for one to five years, and be fined from 10 to 100 times the minimum

The FIESP then published an opinion praising this ‘evolution’.²⁹⁸ But the Federation criticised the fact that bill n 3/55 had increased the list of anticompetitive acts, when this should have been reduced. Consequently, FIESP suggested the removal of many provisions related to the definition of anticompetitive practices.²⁹⁹

The Federation of Brazilian Commerce Associations (FAC) also lobbied against bill n 3/55, arguing that:³⁰⁰

- Several sectors have one or a few players because there was a shortage of capital in Brazil. The elimination of monopolies and oligopolies in those sectors should be made through industrial policy to inject more capital into the markets, and not through antitrust enforcement.
- The legislation should consider that many industries were monopolised or oligopolistic because they were still developing. Thus, provisions of the legislation should be flexible to consider specific structural, cyclical and regional variations.³⁰¹

wage. It can be inferred, therefore, that Magalhães, who was the author of the bill n 3/55, considered Quadros’ bill more interventionist. 'Entrevista com Paulo Germano Magalhães' (1986) Nova Fase, n 1, Jan/Fev Revista do CADE (as cited in Pedro Henrique Navarrete, 'As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962–1994)' (Dissertação de Mestrado em Economia, Universidade Federal do Rio de Janeiro 2013) 23).

²⁹⁸ The full opinion is available at *O Estado de São Paulo* (São Paulo, 9 May 1961) 27.

²⁹⁹ The FIESP argued that the following provisions should be removed: cartel bidding, since it was already established to be a crime by another legislation; the provision that tied ‘price increase’ to ‘increase on costs’; the provisions on competition between traders, since it was already regulated by another law; the provision related to tax evasion, since it was already regulated by another legislation; the provision that would allow Cade to take administrative and judicial actions in order to terminate intellectual property, or monopoly granted by the state (FIESP argued that it was a constitutional right to enter into exclusive-dealing agreements); and the provision that banned ‘the termination of corporate activities with the intent of monopolising markets’ (FIESP argued that the termination of corporate activities may frequently be normal and lawful; and that the provision harmed property rights). Moreover, FIESP also argued that the conceptualisation of economic power abuse was broad and unclear.

³⁰⁰ The full opinion is available at *O Estado de São Paulo* (São Paulo, 26 April 1961) 22.

³⁰¹ Moreover, they argued, there should be a distinction between minor abuses that harm just a few individuals and entities, and major abuses that harm the community.

- The creation of an administrative competition authority would violate the Constitution; and abuse of political power by the state would be worse than abuse of economic power by corporations.³⁰²
- The Federation further argued that other provisions should be removed due to *excessive punishment*.³⁰³

After years of parliament discussions, bill n 3/55 finally passed in 1962 and became Brazil's first Competition Act (Law n 4137/62).³⁰⁴

The Competition Act 1962 prematurely became 'dead law', however. Two years after its enactment, business elites backed a military coup that resulted in an authoritarian regime (1964–1985).³⁰⁵ With the support of business elites — who reportedly viewed competition law with distrust³⁰⁶ — the military administration

³⁰² Therefore, they argued, the judiciary should be responsible for the enforcement of the legislation, and the economic aspects of the case should be dealt with by a technically qualified body, with representatives from the producing classes.

³⁰³ They argued that the legislation should not ban 'exaggerated profits'; the provision related to tax planning and tax evasion should be removed; and business associations should be heard in order to elaborate an antitrust law. It should be noted that they expressed that they were in favour of an antitrust law, but not the one proposed through the bill.

³⁰⁴ Lei nº 4137, de 10 de setembro de 1962, DOU 27/11/1962 e retificado em 30/11/1962. Felipe Pereira Loureiro, 'Relativizando o Leviatã: Empresários e Política Econômica no Governo Jânio Quadros' (2010) 40 Estudos Econômicos (São Paulo) 561. According to Loureiro, FIESP, FAC, ACSP, CNC, and CONCLAP handed out their written opinions to the president of the republic, the president of the lower house (Chamber of Deputies), the vice-president of the Senate, party leaders and deputies and senators in general. In addition, Loureiro mentions that FIESP and the Federation of Trade Associations (FAC) sent lobbyists to the Congress' committees of justice, economy and finance (where the bill was intensively discussed), and also directly approached congressmen of these committees. Franceschini also reports that the Federation of the Industries of the State of Guanabara attended the meeting at the economy committee. José Inácio Gonzaga Franceschini and José Luiz V de A Franceschini, *Poder Econômico: Exercício e Abuso: Direito Antitruste Brasileiro* (Editora Revista dos Tribunais 1985) 11.

³⁰⁵ See, eg, Ben Ross Schneider, *Business Politics and the State in Twentieth-Century Latin America* (Cambridge University Press 2004) 107. Leigh A Payne, *Brazilian Industrialists and Democratic Change* (Johns Hopkins University Press 1994) 16. Eli Diniz, 'Empresariado Industrial, Representação de Interesses e Ação Política: Trajetória Histórica e Novas Configurações' (2010) 9 17 Política & Sociedade 101, 104.

³⁰⁶ Luiz Carlos Delorme Prado, 'Defesa da Concorrência e Desenvolvimento: Notas Sobre o Debate e sua Aplicação no Caso Brasileiro' in Dulce Monteiro Filha, Luiz Carlos Delorme Prado and Helena M M Lastres (eds), *Estratégias de Desenvolvimento, Política Industrial e Inovação: Ensaio em Memória de Fabio Erber* (BNDES 2014) 266.

implemented developmentalist economic policies that established price controls on many industries.³⁰⁷ The competition authority (that is, Cade), on the other hand, significantly lacked in human and financial resources during this period.³⁰⁸ Cade frequently lacked minimum quorum due to delays in military presidents appointing new commissioners to vacant places.³⁰⁹ Thus, during the military regime, the country had a *de jure* competition law, but not a *de facto* one.

5.2.3. The Law n 8158/91

With re-democratisation, Brazil began a process of economic liberalisation³¹⁰ and, in 1991, government agency price fixing was completely extinct.³¹¹ New legislation (n 8158/91)³¹² was enacted introducing merger reviews, in order to complement the Competition Act 1962, which only regulated cartels and unilateral conduct. The Law n 8158/91 derived from several provisional measures that had been enacted by president Fernando Collor in 1990.³¹³

³⁰⁷ The military government created the Interministerial Price Council (the CIP), which organised cartels in many industries, fixing minimum and maximum prices. The military regime also used the National Superintendency (SUNAB) to establish price-controlled cartels in other industries. See Navarrete, 'As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962–1994)' 106. Todorov and Filho, 'History of Competition Policy in Brazil: 1930–2010' 222.

³⁰⁸ Navarrete, 'As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962–1994)' 28.

³⁰⁹ Carvalho and Ragazzo, *Defesa da Concorrência no Brasil: 50 anos*, 48.

³¹⁰ President Collor privatised state-owned companies and adopted a trade liberalisation agenda. See Todorov and Filho, 'History of Competition Policy in Brazil: 1930–2010' 232.

³¹¹ Navarrete, 'As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962–1994)' 7. See also Carvalho and Ragazzo, *Defesa da Concorrência no Brasil: 50 anos*, 54.

³¹² Lei n° 8158, de 8 de janeiro de 1991, DOU 9/1/1991.

³¹³ See Todorov and Filho, 'History of Competition Policy in Brazil: 1930–2010' 231. Navarrete, 'As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962–1994)' 108. In 1987, José Sarney, Brazil's first civilian president after re-democratisation, reportedly threatened to draft a new antitrust law because he thought 'the Brazilian business do not know how to live with a free price system.' However, this reported threat did not evolve. *O Estado de São Paulo* (São Paulo, 12 May 1987).

I could not find any full opinion from a business entity about the Law n 8158/91 filed on congressional records or published in the press, or any academic article that referred to it.

I have found only one press article briefly reporting that FIESP supported the enactment of the legislation.³¹⁴ Assuming that the report is accurate, we can speculate that business' support of the legislation may be related to the process of liberalisation of the economy. In this sense, perhaps Brazilian industrial companies feared that foreign companies with more capital would acquire them. On the other hand, Brazilian companies that wanted to receive foreign investments might have thought that institutions, such as a merger review, would attract more foreign investment.

In any event, the enactment of the new legislation had little effect: Cade still faced difficulties in enforcing competition legislation,³¹⁵ with significant impairment of human and financial resources.³¹⁶

5.2.4. The Competition Act 1994 (Law n 8884/94)

In 1993, president Itamar Franco and some members of the Congress started to build a consensus to unify competition provisions across both Acts (Laws n 4137/62 and 8158/91) into one Act and grant to Cade more resources to enforce it, in order to finally introduce *effective* competition law in Brazil.³¹⁷

³¹⁴ *Folha de São Paulo* (São Paulo, 4 August 1990).

³¹⁵ Navarrete, 'As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962–1994)' 102.

³¹⁶ Carvalho and Ragazzo, *Defesa da Concorrência no Brasil: 50 anos*, 53. See also Todorov and Filho, 'History of Competition Policy in Brazil: 1930–2010' 231.

³¹⁷ President Franco and many congressmen viewed the bill as helpful to put an end to the hyperinflation problem originated in the 1980s, therefore assisting the implementation of the Real currency, which was created in 1994 to fix the problem. Carvalho and Ragazzo, *Defesa da Concorrência no Brasil: 50 anos*, 55.

Once again, business elites lobbied against this competition bill. The bill suffered systematic opposition from the CNI and the FIESP, according to Ruy Coutinho, president of Cade at the time.³¹⁸ Press accounts report that FIESP lobbied senators and the president of the republic to block provisions that would give Cade ‘too much power’.³¹⁹ CNI’s and FIESP’s leaders also gave statements against the bill to the press. The president of FIESP reportedly said that the competition bill was unnecessary because Brazil already had a competition legislation: ‘the problem in Brazil is not legislation, but its enforcement’.³²⁰ Similarly, the president of CNI considered the bill unnecessary and ‘draconian’ (that is, excessively harsh).³²¹ In addition, congressional dockets show that the Trade Association of São Paulo (ACSP) filed a brief claiming that the bill should be entirely rejected.³²²

Despite the lobbying from those large business associations against it, the bill passed.³²³ Brazil finally had its first effective antitrust legislation (the Competition Act 1994³²⁴).³²⁵

³¹⁸ Ruy Coutinho, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE* (Singular 2009) 31. Prado also reports the intense lobby from CNI and FIESP. Prado, 'Defesa da concorrência e desenvolvimento: notas sobre o debate e sua aplicação no caso brasileiro' 295.

³¹⁹ *Folha de São Paulo* (São Paulo, 9 June 1994). Ibid, 10 June 1994.

³²⁰ Ibid, 9 June 1994.

³²¹ Ibid. By contrast, the Chamber of Deputies’ decision to admit the competition bill was cheered by workers and consumers, according to newspaper *Estadão*, *O Estado de São Paulo* (São Paulo, 9 June 1994).

³²² Brief filed in the congressional bills’ records in 27 July 1993. Câmara dos Deputados, Projeto de Lei nº 3712/1993, fls 393–397. The ACSP argued against Cade’s prerogative to determine the preventive cessation of the practice that restricts competition, Cade’s prerogative to apply fines if the corporation does not stop the practice after a preventive order, and so on.

³²³ Press accounts reported that the right-wing Liberal Front Party (PFL) influenced the bill by reducing the fine for cartels and abuse of dominant position practices. At the Chamber of Deputies stage, the centre-left Social Democrat Party (PSDB) and the left-wing Workers Party (PT) at the time were in favour of a minimum fine of 10% (PSDB) and 15% (PT), and maximum fine of 50% (both parties agreed) of the firm’s pretax gross sales of the exercise prior to the filing of the administrative proceeding. The PFL, on the other hand, stated that would only approve the bill if the fines were reduced to 1% (minimum) and 30% (maximum) of the firm’s annual revenue of the previous year of the filing of the lawsuit. The provision was then changed to accommodate PFL’s request. *Folha de São Paulo* (São Paulo, 8 June 1994). The press article only reports that PSDB was in favour of the 10–50% fines. But Senator Eduardo Suplicy from PT said in the Senate’s plenary that PT was arguing for similar fines — ie, between 15–50%. Congresso Nacional, *Diário*, 10 de junho 1994, 2900. Suplicy proposed the same amendment in the Senate. Ibid 2888.

Nevertheless, after the enactment of the Act of 1994, the CNI continued to fight against some of its provisions. The Confederation filed a Direct Unconstitutionality Action (ADI) at the Supreme Court, claiming that seven provisions of the Act violated the Constitution.³²⁶

- The cap of the fine (that is, 30% of the of the firm's pretax gross sales of the exercise prior to the filing of the administrative proceeding) was arguably confiscatory and violated the right to property, which is protected by article 150, IV, of the Constitution. The CNI argued that this cap could be in practice more than the annual income of many industrial sectors. As a consequence, the fine would lead many companies to bankruptcy, harming employers and workers.³²⁷
- The term 'notwithstanding malicious intent' on article 20 would violate the Constitution because it would establish strict liability to those who practised an anticompetitive act.³²⁸
- And other provisions that the Confederation viewed as excessive interventions by the state, which would violate the Constitution.³²⁹

³²⁴ Lei nº 8884/1994. For an English translation of the 1994 Act, translated by Cade — see, <<http://en.cade.gov.br/topics/legislation/laws/law-8884-1994b.pdf/view>> accessed 17 February 2017.

³²⁵ Todorov and Filho, 'History of Competition Policy in Brazil: 1930–2010' 233. The press reported that industrial companies linked to FIESP were disappointed with Cardoso — then Senator, and future candidate for the Presidency, backed by business — for voting in favour of the competition bill. *O Estado de São Paulo* (São Paulo, 11 June 1994).

³²⁶ STF, ADI 1094-8/DF, Rel Min Carlos Velloso, DJ 20/04/2001. The Supreme Court denied all CNI's claims. The Court's decision was preliminary since it regarded CNI's request for provisional remedies. It is unlikely that the Supreme Court will ever place a final decision on the case because Brazil now has a new Competition Act, enacted in 2011.

³²⁷ CNI's complaint at the ADI 1094-8/DF, 8.

³²⁸ *Ibid* 3–5.

³²⁹ The other CNI claims were the following: (a) Article 21, item XXIV, which established that it would be unlawful 'to impose abusive prices, or unreasonably increase the price of a product or service' should be removed. For CNI, the item was too vague, and could be mistakenly interpreted by the competition authority and judges, resulting in price control, and thus confronting articles 173 and 174 of the Constitution, which establishes a market economy (pages 5–8). (b) The Constitution was violated by items II and IV of article 24 of the Act which established that Cade could apply additional fines 'whenever the severity of the facts or the public interest so requires', so to turn the lawbreaker

Moreover, CNI and FIESP also expressed dissatisfaction with the enactment of the Competition Act through opinions published in the press,³³⁰ and reportedly at a conference attended by the minister of justice.³³¹

It is noteworthy, however, that press accounts reported three exceptions to those business association's reactions against what they viewed as the *excessive* state intervention of the Competition Act 1994. And these exceptions came from organisations of small and medium companies, and their leaders. After the Act was enacted, the Union of Small and Micro Industries (Simpí) launched an official note supporting it.³³² Moreover, Emerson Kapaz, who was then the coordinator of the National Thought of Entrepreneurial Base (PNBE), an association of small and medium businessmen,³³³ reportedly said that the legislation enacted was very positive.³³⁴

Likewise, Eduardo Capobianco, who was a founding member of the PNBE and

ineligible 'for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years', and/or to suggest that the proper public agencies should grant compulsory licences for patents held by the violator; and deny the violator instalment payment of federal overdue debts, or order total or partial cancellation of tax incentives or public subsidies. The CNI argued that the provisions banned the free exercise of business activity, namely the free exercise of professional activity, harming article 5, items XIII, XVII, XVIII and XIX of the Constitution (pages 10–11). (c) The provision that stated that the clearance of a merger may be reviewed by Cade if 'the intended benefits have not been attained' (article 55) violated vested rights protected by the Constitution (article 5, item XXXVI) (pages 11–13). (d) The part of article 64 that established that the judicial review would take place in the district chosen by Cade, would violate article 109, first paragraph, of the Constitution (pages 13–14). (e) The article 60 of the Act, which established that the lawbreaker should deposit the fines (instead of designate assets) as a requirement to pursue judicial review, would violate the constitutional guarantee of access to justice (article 5, item XXXV, of the Constitution) (pages 14–15).

³³⁰ The FIESP published an opinion expressing discontentment with articles 20 and 21 of the Act. *Folha de São Paulo* (São Paulo, 15 June 1994).

³³¹ The president of CNI said, at the Conference, that the Competition Act 1994 was confiscatory. *O Estado de São Paulo* (São Paulo, 19 August 1994) *O Estado de São Paulo* (São Paulo, 19 August 1994).

³³² *Ibid*, 11 June 1994.

³³³ Fabrícia Guimarães, 'Verbete: Pensamento Nacional das Bases Empresariais (PNBE)' (Centro de Pesquisa e Documentação de História Contemporânea do Brasil da Fundação Getúlio Vargas) <<http://www.fgv.br/cpd/doc/acervo/dicionarios/verbete-tematico/pensamento-nacional-das-bases-empresariais-pnbe>> accessed 15 April 2018.

³³⁴ *Gazeta Mercantil* (São Paulo, 19 August 1994) (as cited in Carlos Alberto Bello, *Autonomia Frustrada: O CADE e o Poder Econômico* (Boitempo Editorial 2005) 129).

president of the Civil Construction Industry Union of the State of São Paulo (SindusCon-SP) at the time, reportedly expressed support for the new legislation after its enactment.³³⁵

5.2.5. Conclusion of the section

We have seen that business representative organisations have consistently monitored and tried to influence the outcome of antitrust bills from 1945 to 1994.

The overwhelming majority (more than 80%)³³⁶ of business representative bodies' comments were against *excessive* antitrust intervention. If we consider only those comments from business representative bodies that occurred *during* the legislative process and ignore the ones that were made *after* the legislation was enacted, more than 94% were against excessive state intervention.³³⁷

Interventions from the CNI, which is the largest and leading business representative organisation in Brazil,³³⁸ have always been against (what they viewed as) potential excessive antitrust intervention.

This lobbying pattern continued in the legislative process of the Competition Act 2011, as will be seen next.

³³⁵ *O Estado de São Paulo* (São Paulo, 15 June 1994) B-8.

³³⁶ 17 out of 21 manifestations.

³³⁷ 17 out of 18 manifestations.

³³⁸ Created in 1938, CNI embraces 27 state industrial federations and the federal district, and about 1,300 industrial employers' unions. Santos, 'O Parlamento sob Influência: O Lobby da Indústria na Câmara dos Deputados'.

5.3. The legislative process of the Competition Act 2011

The Competition Act 2011 (Law n 12529/11),³³⁹ the current Brazilian antitrust legislation, is in many ways less interventionist than the Act of 1994. For example, the new legislation not only reduced the minimum and maximum fines for corporations' anticompetitive practices set forth in the Act of 1994 (from 1% and 30%, to 0.1% and 20%), but also narrowed the fine's base calculation. Consequently, corporations have been penalised with weaker fines than when the Competition Act 1994 was in force, as has been confirmed by Cade case law.³⁴⁰ There are informal estimations that some corporations convicted by Cade in cartel cases were fined 20% less in the Act of 2011 than they would have been fined if the Act of 1994 was still in force.³⁴¹

This softening in the legislation matches the fact that the Competition Act 1994 was made by politicians elected *without* corporate funding (because it was prohibited at the time), while the Act of 2011 was made by politicians who received such funding.³⁴²

In this section, we will try to examine a bit deeper if corporate donations had anything to do with these lesser interventions.

I will start looking at the industrial lobbying on the antitrust bill n 3937/2004 (the bill which originated the Competition Act 2011). Subsequently, I will examine the amendments proposed by congressmen. Then, we will see if there is any pattern between how congressmen were financed and the amendments they proposed. And, finally, I will briefly discuss the impact of the amendments on the bill.

³³⁹ Lei n° 12529/2011.

³⁴⁰ See footnote 402.

³⁴¹ According to informal conversations with Brazilian antitrust lawyers.

³⁴² Some may argue that congressmen who passed the Competition Act 1994 might have received off-books donations from companies. However, until evidence concerning each of the congressmen arises, we can never know it for sure and investigate what role corporate money has played in the legislative process.

5.3.1. The industrial lobbying

The CNI, which is the largest and leading business representative organisation in Brazil as we have seen, expressly considered the competition bill n 3937/2004 *a priority* due to its ‘high impact on the business environment’. The Confederation intensely monitored the competition bill and lobbied congressmen in order to try to modulate the provisions according to industry interests.³⁴³

The CNI admittedly lobbied for the *reduction of the fine’s cap and base calculation* during the legislative process of the bill. The Confederation lobbied that the cap (which was 30% in the Act of 1994) and the base calculation (which was the total revenue of the company) should be reduced to 20% of the gross sales obtained in the relevant market. They argued that this would be a measure of ‘fiscal justice’ for two reasons. Firstly, they argued, because the fine’s cap and base calculation established by the Competition Act 1994 could interrupt company operations, since it would intensely impact their economic capacity — from the capacity to invest, fund and improve; to the attractiveness of the production and provision of services as a whole.

³⁴³ The competition bill was part of CNI’s *minimum agenda*, that is, bills that should be treated with priority. From the 117 bills monitored by the Confederation in 2008, 20 of them were considered as being part of the *minimum agenda*. Moacyr Oliveira, ‘CNI lança Agenda Legislativa da Indústria com Pauta Mínima’ *Sistema Federação das Indústrias do DF (Fibra)* (7 April 2010) <<http://www.sistemafibra.org.br/fibra/sala-de-imprensa/noticias/258-documento-lista-117-projetos-em-tramitacao-no-congresso-nacional-de-interesse-do-setor-industrial.html>> accessed 22 November 2016. According to its online agenda, the competition bill was part of CNI’s minimum agenda at least from 2008 until 2011, when the bill finally passed (CNI began to publish its agenda online only from 2008 onwards). CNI (Confederação Nacional da Indústria), Unidade de Assuntos Legislativos, ‘Agenda legislativa da indústria’ <<http://www.portaldaindustria.com.br/cni/canaais/agenda-legislativa-home/>> accessed 22 November 2016.

Secondly, the CNI argued, ‘it makes no sense to impose a fine on the company's total revenue, which includes activities that have no relation to the anticompetitive offence’.³⁴⁴

Moreover, *the CNI also lobbied for the elevation of the thresholds for merger control*. The Confederation argued that there was an *excess* of merger control, since 90% of the merger cases analysed by Cade were cleared without conditions.³⁴⁵

As we have seen in the last section, lobbying practices are not regulated in Brazil. Therefore, it is not possible to know precisely all the business associations and/or companies that lobbied on the competition bill, and what they lobbied for. However, we do know that, according to the evidence available, business organisations — particularly large corporations through the associations in which they belong — have tended to lobby for *less* antitrust intervention. Thus, there is a good chance that, if other business’ lobbying occurred, they were lobbying in this same direction. In any event, the lobbying from the largest and leading business representative organisation in Brazil (that is, CNI) is already significant enough on its own to potentially influence any congressmen, particularly ones funded by corporations.

5.3.2. The amendments proposed

After 2002, the Brazilian Electoral Superior Tribunal (TSE) began publishing online data about who funded candidates and parties.³⁴⁶ Therefore, it is possible to compare the congressman’s funding with his behaviour towards a bill, such as the

³⁴⁴ Ibid, ‘Agenda legislativa da indústria 2010’ <<http://www.portaldaindustria.com.br/publicacoes/2015/12/agenda-legislativa-da-industria/#agenda-legislativa-da-industria-2010%20>> accessed 18 March 2018.

³⁴⁵ Ibid.

³⁴⁶ The data on Brazilian political finance is precarious before 1994, when the previous major competition legislation was enacted — see de Souza, ‘A Evolução da Regulação do Financiamento de Campanha no Brasil (1945–2006)’.

Gomes (PSB) then analysed the two bills, merged them into one and proposed new amendments. That is, he proposed a substitute bill (but it remained with n 3937/2004), which consolidated the separate prior bills. Though it is not possible to determine a pattern before the consolidation of the bills and a pattern for Gomes' amendments and decisions,³⁵¹ *it is possible to track the subsequent amendments proposed by other congressmen on the consolidated version of the bill that emerged after Gomes' analysis.*

After the consolidation of the bill, the following congressmen proposed amendments: deputies Cezar Silvestri, Guilherme Campos, and senators Romero Juca, Wellington Salgado, João Pedro, Cícero Lucena, José Agripino Maia and Francisco Dornelles. Deputy Pedro Eugênio, in turn, was responsible for reviewing all Senate's amendments after the bill returned to the Chamber of Deputies. Since the rejection of an amendment has the same impact as its proposition, I will also consider Eugênio's and other congressmen justifications for rejecting amendments.

However, many amendments concerned matters that were not related to the extent of the state's intervention in the economy. Or, their impact on the state's intervention in the economy is rather indirect. Or, it is unclear if the amendment would have positively or negatively impacted the extent to which the state would have

³⁵¹ Gomes' analysis has mixed results, with an equal concern for both insufficient punishment and excessive punishment. Moreover, Gomes said that his substitutive was actually a consolidation of the opinion of all members of a special committee created for the competition bill. Gomes also took into account suggestions from experts on competition law, who were heard by the committee. Gomes states that his substitutive can be called a 'collective work', and that it represents an 'average' of all deputies' suggestions. However, these suggestions were mostly made off-the records, in background meetings between party leaders and members of the committee.

Before the creation of the special committee, only Deputy Bernardo Ariston proposed amendments. On 15 December 2004, he proposed two amendments: one to exclude 'to impose abusive prices, or unreasonably increase the price of a product or service' as an anticompetitive practice, and another one to exclude the 'increase profits on a discretionary basis' as an anticompetitive effect of a practice. However, no other deputy proposed an amendment. This deficiency of amendments indicates that the bill was not relevant to deputies and political parties before the creation of the committee and the subsequent consolidation of dispersed competition bills.

Thus, I will consider the amendments proposed after the consolidation of the competitions bills because of the lack of significant political debate on the competition bills before their consolidation; because of the lack of transparency on the procedures of the special commission; and because Gomes' analysis has mixed results.

intervened in the economy. Thus, *I will focus on the amendments that related to provisions that: (a) established the practices considered as anticompetitive; (b) established the fines for an anticompetitive practice; and (c) which mergers should be notified to the competition authorities.*³⁵² As a consequence, I will not consider the amendments proposed by Campos, Juca,³⁵³ Pedro and Lucena, since they do not fit these criteria.

Moreover, *I will focus on the justifications for the amendment, rather than the amendment itself.* By adopting this approach, I aim to improve precision, reduce the margin of subjectivity and avoid controversy. I will consider, therefore, when politicians *expressly* argue that a provision should be introduced, changed or deleted *because corporations or businessmen will be excessively or insufficiently regulated/punished.* I will try to avoid tacit arguments due to potential overwhelming subjectivity and consequent controversy.

Actually, the congressmen's justifications indicate the actual effect of the amendment, most of the time. For example, if the politician explains that he is concerned about excessive punishment, his amendment will likely make the bill less interventionist. Even if the congressman is hiding his real motivation (for example, to benefit a given donor), his formal justification for proposing an amendment will necessarily express its likely effect (for example, less intervention). It would be quite unlikely that one single congressman could fool all other members of Congress, the press, and the antitrust

³⁵² Other provisions that could indicate a clear concern with excessive or insufficient enforcement, such as remedies for a merger, were not amended.

³⁵³ Although there is an ongoing lawsuit in which a leniency agreement alleges that senator Romero Juca intervened in the competition bill n 3937/2004 to favour the construction company Odebrecht in exchange for campaign finance, the documents found in this research were not able to grasp any confirmation on how the senator would have done this. MPF (Ministério Público Federal), Delação Premiada, Cláudio Melo Filho. To read the document, see 'Leia a íntegra da delação do ex-diretor da Odebrecht Cláudio Melo Filho' *Poder360* (10 December 2016) <<https://www.poder360.com.br/wp-content/uploads/2016/12/Delacao-ClaudioMelo-Odebrecht-dez2016.pdf>> accessed 16 February 2018.

community³⁵⁴ by justifying that a given amendment would result in more intervention if it would actually result in less.

In any event, in this case study there were only two exceptions to the rule that *the congressmen's justifications indicate the actual effect of the amendment*. As we are going to see, in one amendment deputy Eugênio is concerned about excessive merger control, but paradoxically ends up accepting the Senate's amendment that will likely result in more merger control; and in contrast, in another amendment, he is concerned about insufficient regulation, but paradoxically ends up accepting the Senate's amendment that will likely result in less regulation. Moreover, in another amendment, it is unclear if senator Mercadante is concerned about excessive or insufficient antitrust regulation. And, finally, another amendment proposed by senator Dornelles lacks justification. Nonetheless, these four peculiar cases do not have any relevant impact on the results found. Because they are in such a small number, even if we hypothetically had considered each of them as an argument for less intervention or an argument for more intervention, this would have not changed the pattern found.

In addition, because I want to compare campaign finance with congressman behaviour, I will not consider the substitute senators³⁵⁵ who are eventually holding office but did not run for it, since they did not receive campaign donations. It is not possible to compare elected politicians, who dispute elections, with substitute senators, as it is unclear if they would have the same motivations. For instance, elected politicians most frequently run for more elections after leaving office, which is not the case for a substitute senator.

³⁵⁴ Many members of the antitrust community (lawyers, economists, commissioners and academics) followed with interest the legislative process of the bill.

³⁵⁵ In Brazil, 'each Senator shall be elected with two substitutes' (article 45, paragraph 3 of the Constitution 1988). The substitute shall be called in cases of vacancy; of investiture in the office of minister of state, governor of a territory, secretary of a state, of the Federal District, of a territory, of a state capital or head of a temporary diplomatic mission; or of leave of absence exceeding one hundred and twenty days (Article 56 of the Constitution 1988).

Finally, I assume that not all companies would be concerned about excessive antitrust intervention. Several small and micro companies, for example, have never faced an antitrust case. Therefore, I will focus the analysis on donations from companies that faced an antitrust case at Cade, as a defendant, before the amendment was proposed. I assume that these companies would be more concerned about a competition bill's potential excessive intervention, and who would therefore lobby in this direction (directly, or indirectly, through the CNI or other business associations). Of course, there might be exceptions — for example, a cartel company that was never caught would also be concerned about cartel fines. But this is hard to control for and consider. And it is unclear if this hypothetical company would actually lobby because this could raise questions about the company's motivation for lobbying and risking the hidden ongoing cartel.

In sum, *I will focus the analysis on (i) the amendments proposed or rejected by Silvestri, Mercadante, Maia, Dornelles and Eugênio that concern the definition of anticompetitive behaviour, the fines for an anticompetitive behaviour, and the mergers that should be notified to the competition authority; and (ii) how much money these politicians received from companies — that have been a defendant on an antitrust case — or their top administrators,³⁵⁶ in the campaign that got these politicians elected.³⁵⁷*

To establish the congressmen's donors, I used the data on campaign finance published by the think tank Transparência Brasil, who collected it at the Superior

³⁵⁶ I consider as a donation from the economic group/corporation not only the donations made strictly by the corporation itself as a legal entity, but also the donations made by the individuals who are shareholders that control the company, by the individuals who are part of the board of the company, or are top executives (starting from a director of the company to the top of the hierarchical structure).

³⁵⁷ When delimiting how much total funding a candidate received, I consider the use of own resources by candidates. But I do not consider donations from political parties or other campaigns because it is not possible to identify the original donor or source. For example, the origin could be a corporate donation that was made through the party, as well as it could be a public fund, and so on.

Electoral Tribunal, organised it and published it.³⁵⁸ I considered only corporations who donated in the campaign for the mandate in which the congressmen proposed the amendment. For instance, if the amendment was proposed in 2008 by a congressman elected in 2006, I looked for the donors who donated during that campaign.³⁵⁹

Subsequently, I searched Cade's data through their institutional online search engine, looking for proceedings in which the corporate donors were defendants.³⁶⁰ If the search returned negative, I looked at the company's website or at websites who publish data on corporate ownership (such as the S&P Global Market Intelligence, which is published by Bloomberg) to check if the donor is part of a corporate group who faced an antitrust case.³⁶¹ I considered any antitrust case faced by the corporation, or by its group, *before* the amendment was proposed.

Deputy César Silvestri

Silvestri, from the Popular Socialist Party (PPS), received 28.05% of his campaign fund from companies that have been a defendant in an antitrust case.

On 17 December 2008, Silvestri presented an amendment to extend the provision on predatory pricing. Since the bill was referring only to predatory practices of *products*, Silvestri argued that the ban should be expanded to sectors who offer

³⁵⁸ Transparência Brasil, 'Às Claras — Quem financia quem nas eleições'.

³⁵⁹ It is not feasible to analyse the politician's campaign right after he finished his mandate because not all of them ran for reelection. Therefore, this case study will not consider the supposed circumstances when politicians use their mandate as a platform to raise money for the next election.

³⁶⁰ Cade (Conselho Administrativo de Defesa Econômica), 'Pesquisa Processual' <<http://www.cade.gov.br/assuntos/processos-1>> accessed 22 July 2018.

³⁶¹ I searched the most reliable online sources. Brazil lacks an official online platform gathering corporate structures. The official data on Brazilian corporate structures are dispersed among the state commercial registries and are difficult to access. See Carazza, *Dinheiro, Eleições e Poder: As Engrenagens do Sistema Político Brasileiro*, 49.

services.³⁶² He argued that sectors who offer *services* also can suffer from predatory price practices in the same way as sectors who offer *products*: they both harm the economy.

Therefore, he was concerned about *insufficient* punishment.³⁶³

Senator Aloizio Mercadante

Mercadante received 73.91% of his campaign fund from companies that have been a defendant on an antitrust case. He was the Workers' Party (PT) leader in the Senate at the time he proposed his amendments.³⁶⁴

On 21 December 2009, Mercadante, proposed an amendment to reduce the minimum fine for anticompetitive acts — from 1% to 0.1% of the company's annual revenue (of the year previous to the start of the administrative proceeding).³⁶⁵ On the other hand, he raised the base calculation for the fine, from the gross sales in the relevant market, to the total revenues of the company excluding taxes.

Mercadante's justification to change the base calculation was that the fine should have a clear and objective criterion, because companies need to have some level of *predictability* of state action and also because frequently companies appeal to the

³⁶² Câmara dos Deputados, Projeto de Lei nº 3937/2004, Emenda nº 5, pg 4 <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=627695&filename=EMP+5/2008+%3D%3E+PL+3937/2004> accessed 22 November 2016.

³⁶³ Silvestri proposed other amendments, but their impact on the state's intervention in the economy would be rather indirect. Three amendments established that only public servants could hold office for certain top positions in the competition authority; another amendment removed a provision that established that Cade could sell its publications and use the money received for their future budget; and finally another amendment established that Cade's president should attend two congressional committees' sessions per year in order to provide clarification on antitrust cases enforced by the competition authority.

³⁶⁴ *Zero Hora*, 'A pedido de Lula, Mercadante segue líder do PT no Senado' (21 August 2009) <<http://zh.clicrbs.com.br/rs/noticia/2009/08/a-pedido-de-lula-mercadante-segue-lider-do-pt-no-senado-2626207.html>> accessed 22 November 2016.

³⁶⁵ Emenda nº 33 — Plenário ao Projeto da Câmara nº 6, de 2009, pg 4 <<http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=72323&tp=1>> accessed 22 November 2016.

judiciary to review the fine applied by the competition authority. For him, a criterion that uses the relevant market concept as a base does not guarantee this objectivity because frequently economic analyses disagree about what the relevant market is in a given case. Mercadante then concluded that the reduction of the minimum level of 1% to 0.1% would be enough to guarantee what he called as *proportionality* between the conduct and the penalty imposed. Finally, he excluded taxes also to maintain the *proportionality* of the fine.

We can notice that Mercadante was concerned about two issues: *predictability* and *proportionality* of the fine. His concern about *proportionality* is a concern to not *excessively* punish companies: he *reduced* the minimum level and also *excluded* taxes, arguing for proportionality.

On the other hand, his *predictability* concern infers that he was also concerned about *insufficient* punishment: when he says that frequently companies appeal to the judiciary to review the fine applied by the competition authority, he is inferring a concern about the effectiveness of Cade's fine towards the judiciary review.

Finally, his statement that “companies need to have some level of *predictability* of the state's action” does not *clearly* relate with either a concern with excessive or insufficient punishment. Therefore, per our methodology we shall not take this justification into account.

In sum, we can conclude that Mercadante had two evident concerns about *excessive* punishment, and one concern about *insufficient* punishment.

Another amendment presented by Mercadante raised the criterion of minimum revenue for notification of mergers and acquisitions to Cade: from R\$ 150 million to R\$

400 million.³⁶⁶ That is, only companies that earned R\$ 400 million or more in the year previous to the deal should submit the merger or acquisition for Cade's analysis.

Mercadante argued that by adopting the criterion of R\$ 400 million minimum revenue for notification of mergers and acquisitions, the previous competition legislation (Act of 1994) led Cade to clear without conditions 90% of the cases (that is, most cases did not present anticompetitive concerns). Thus, the argument follows, the reduction of the limit to 150 million certainly make Cade analyse mergers harmless to competition, wasting public resources. We can observe, therefore, that Mercadante was concerned about *excessive* merger control.³⁶⁷

Senator Francisco Dornelles

Dornelles, from the conservative Popular Party (PP), received 95.40% of his campaign fund from companies that had been a defendant in an antitrust case. He was the rapporteur of the bill in the committee of infrastructure's services of the Senate.³⁶⁸

Fines for cartel and abuse of dominant position cases

Dornelles proposed an amendment to reduce the maximum fine for anticompetitive acts, from 30% to 20%.³⁶⁹ This amendment also reduced the base

³⁶⁶ Ibid 5.

³⁶⁷ Mercadante proposed other amendments, but their impact on the state's intervention in the economy would be rather indirect. One granted the Secretariat of Economic Monitoring of the Ministry of Finance (SEAE) the prerogative to give a non-binding opinion on competition matters of any public or private entities. And another amendment established that Cade's plenary (and not Cade's president alone) should have the authority to sign administrative contracts and cooperation agreements with other national and international entities, such as foreign competition authorities.

³⁶⁸ Dornelles was heavily lobbied by the CNI, as the Confederation publicly declared. See CNI (Confederação Nacional da Indústria), CNI em Ação, 'Aprovada nova estrutura do Sistema Brasileiro de Defesa da Concorrência' (14 October 2011) <<http://admin.cni.org.br/portal/data/pages/FF808081272B58C0012730BE20A57BDA.htm>> accessed 22 November 2016. The final versions of his amendments were proposed on 30 November 2010.

calculation — for Dornelles, the fine should be calculated considering only the gross sales obtained *in the field of the business activity on which the infringement took place* in the latest financial year (for example, the cement market), and not the *total gross pretax revenue* of the company (for example, not only the sales on the cement market, but also of all other business that the company might have).³⁷⁰ Consequently, the same amendment further reduced the minimum fine proposed by Mercadante, by establishing it on 0.1% of the gross sales obtained in the *business activity in which the infringement occurred* — Mercadante suggested the same percentage, but of a larger base calculation, which was the *total gross pretax revenue of the company*.³⁷¹

Dornelles' justification for the amendment was that 'the payment of a fine of 30% of the annual gross revenue would certainly lead the company to halt its activities (wholly or in substantial part), and would lead the company to fail to comply with labour, social security and tax debts, among others, as well as debts with business partners'.³⁷² As a consequence, the argument follows, 30% of the annual gross revenue cap 'is excessive and violates the constitutional principles of free economic initiative, the social function of property and enterprise, and the pursuit of full employment of

³⁶⁹ All Dornelles' amendments were formally presented as sub-amendments, which does not change our analysis.

³⁷⁰ Dornelles presented four versions of his opinion, from 31/08/2010 to 30/11/2010. The last version, presented on 30/11/2010, was the one read and approved by the committee of infrastructure's services. It is puzzling that between the penultimate opinion presented in 08/11/2010 and the last one presented in 30/11/2010, he changed the base calculation from 'relevant market' to 'field of the business activity'. He did not justify this change in opinion. Therefore, we can only speculate as to his motivation — perhaps he was concerned about the uncertainty of the term 'relevant market', which is frequently a controversial issue on antitrust cases, for example. Nonetheless, Dornelles' solution has not been very effective. As the term 'field of the business activity' is exotic to antitrust scholarship, this gave Cade wide discretion to interpret it. Several competition lawyers have been arguing that Cade has been illegally interpreting 'field of the business activity' as more broadly than the 'relevant market' standard — for example, see the petition filed by the defendants on the *Processo Administrativo* nº 08012.011027/2006-02, requesting for resolution of conflict in Cade's decision. Perhaps Dornelles was not able to foresee this problem. But, again, as Dornelles' change on this matter lacks justification, we do not know what his motivation was — we can only speculate it. What we do know is that he reduced significantly the base calculation proposed by Mercadante, who presented the last amendment on the matter.

³⁷¹ Parecer cj2010-05566, Comissão de Serviços de Infraestrutura <<http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/84379.pdf>> accessed 22 November 2016.

³⁷² Ibid 5.

production factors’.³⁷³ Thus, ‘by setting the cap at 20% of the gross sales obtained in the field of the business activity, the amendment meets the principle of proportionality in economic matters and is able to inhibit the practice of illicit competitive’.³⁷⁴ Similarly, Dornelles argues that a reduction in the minimum fine also serves the ‘principle of proportionality in economic matters, granting to Cade the discretion in adopting a fair value and reasonable fine’.³⁷⁵

Therefore, Dornelles reduced the fine’s cap, floor and the base calculation because he was concerned that companies would be *excessively* punished.

Subsequently, Dornelles proposed another amendment to reduce the fine imposed on the *administrator* of the company, both the cap and the floor.³⁷⁶ His amendment reduced the fine for the company’s administrator from 10 % (minimum) and 50% (maximum), to 1% (minimum) and 20% (maximum). Although he did not elaborate a long justification for the amendment, Dornelles used the connector ‘similarly’ at the beginning of his sentence (that is, similar to the justification presented above for the reduction of company fines), which indicates that he also reduced the administrator fine to attend the so-called principle of proportionality. In other words, he indicates that he proposed this amendment also concerned with *excessive* punishment.

Finally, this amendment established that the competition authority needs to demonstrate wilful misconduct or gross negligence of the administrator (in the former legislation, Cade would only have to demonstrate strict liability). Dornelles argued that the previous legislation was ‘contrary to the legal tradition which determines the liability of the administrator of the company only when he behaved with wilful misconduct or

³⁷³ Ibid 4.

³⁷⁴ Ibid 5.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

gross negligence’.³⁷⁷ Again, Dornelles’ motivation here is to avoid *excessive* punishment, particularly in view of what he calls the ‘legal tradition’.

Therefore, while proposing amendments to the fines for cartels and abuse of dominant position cases, Dornelles was always concerned with *excessive* punishment.

Merger control

Another amendment proposed by Dornelles raised even more the criterion of minimum revenue for notification of mergers and acquisitions to Cade: *only companies that have earned R\$ 1 billion (and not R\$ 400 million, as proposed by Mercadante) or more should be required to submit the merger to Cade*. In addition, Dornelles increased the second threshold: *the other company involved in the merger must have had revenue of R\$ 40 million or more (and not R\$ 30 million as it was established in the bill)*. Therefore, only mergers involving a company that has had revenue of R\$ 1 billion or more, with another company that has had revenue of R\$ 40 million or more should be notified to Cade. Dornelles argued that the criterion established by the legislation in 1994 (R\$ 400 million) should be adjusted because of inflation. This adjustment and the introduction of the second threshold would be “consistent with the current financial situation of mergers and facilitate Cade’s work by extirpating the analysis of mergers harmless to competition”.³⁷⁸ Therefore, he was concerned about *excessive* merger control.³⁷⁹

³⁷⁷ Parecer cj2010-05566, p 5.

³⁷⁸ Ibid 6.

³⁷⁹ His concern about excessive merger control is also evident in his speech to the Senate’s plenary on 15/06/2011, when he said that ‘Cade is an institution with archaic thinking that does not understand that strong and large companies are necessary to compete in the international market’, and that ‘because of petty, delayed, minor issues, Cade creates embarrassment to every great merger, bringing great harm to the development and strengthening of Brazilian companies’. *Agência Senado*, ‘Dornelles defende mudanças do Senado em projeto que agiliza atuação do Cade’ (15 June 2011)

Moreover, Dornelles changed a provision to grant antitrust immunity for consortia formed for public bids because “they have proposals that have deadlines for qualification and decisions that are too short for Cade’s [timely] clearance”, which indicates a concern with excessive merger control.³⁸⁰ In this same aspect, he also granted antitrust immunity for associative contracts, consortia or joint ventures created for a temporary specific project. Dornelles, however, did not justify why he gave this last immunity. Although it indicates a concern with excessive enforcement, I will not consider it, in accordance with the methodology I established for this case study.

In sum, Dornelles was concerned about *excessive* merger control when it comes to the minimum revenue criteria for the main company; *excessive* merger control when it comes to the absence of a threshold for the second company; and *excessive* merger control when it comes to public bids.

But, on the other hand, Dornelles re-introduced merger review for corporate capital restructuring. Dornelles argued that corporate capital restructuring should be submitted to Cade analysis because ‘they have the potential to impact competition in the relevant markets’.³⁸¹ Thus, he was concerned about *insufficient* merger control when it comes to more corporate capital restructuring.³⁸²

<<http://www12.senado.leg.br/noticias/materias/2011/06/15/dornelles-defende-mudancas-do-senado-em-projeto-que-agiliza-atuacao-do-cade>> accessed 22 November 2016.

³⁸⁰ Parecer cj2010-05566, p 6.

³⁸¹ Ibid 7.

³⁸² Dornelles proposed other amendments, but their impact on the state’s intervention in the economy would be indirect: he reduced Cade’s deadline to review mergers; made more flexible the guarantee required to contest Cade’s fines in the judiciary; and removed a provision which established *vacation legis* for the new legislation. Moreover, he accepted Mercadante’s amendments about SEAE’s prerogative to give non-binding opinions, and about the authority of Cade’s plenary to sign administrative contracts and cooperation agreements.

Senator José Agripino Maia

Maia, from the right-wing Democrats Party (DEM), received 80.01% of his campaign fund from companies that had been a defendant in an antitrust case.

On 01 December 2010, Agripino Maia proposed an amendment to exclude exclusive-dealing agreements from the list of examples of anticompetitive practices (article 36, paragraph 3, item XIX, of the bill). He argued that exclusive-dealing agreements bring the following benefits: they incentivise companies to invest, result in more employment, give companies better conditions to negotiate, and enhance consumer welfare.³⁸³ Thus, he was concerned about *excessive* punishment.³⁸⁴

Deputy Pedro Eugênio

When the bill returned to the Chamber of Deputies, Pedro Eugênio, from the Workers' Party (PT), was its rapporteur. He was responsible for reviewing all amendments that came from the Senate, and published his opinion on 05 October 2011.

Eugênio received 28.42% of his campaign fund from companies that had been a defendant in an antitrust case.

Fines for cartel and abuse of dominant position cases

³⁸³ Diário do Senado Federal, 2 de dezembro de 2010, p 54817–54818.

³⁸⁴ Agripino Maia proposed no other amendment.

Eugênio opined for the rejection of Dornelles’ amendment that reduced the maximum and minimum fines for anticompetitive acts, and changed the base calculation of the fine.³⁸⁵

Eugênio was concerned about *excessive* punishment in one respect. For him, while the relevant market calculation base only considers products that are a substitute, the term ‘in the field of the business activity’ may also consider complementary products that belong to other parts of the production chain in the case of vertically integrated companies. Therefore, as undue incomes from a given anticompetitive infraction are restricted to the relevant market where it took place, Dornelles’ amendment may *excessively* punish companies.³⁸⁶

On the other hand, Eugênio was even more concerned about *insufficient* punishment. Firstly, he argued, the Senate’s reduction of the maximum percentage would indicate that Cade would impose less rigorous fines, while Congress should aim for the opposite.³⁸⁷ The fines’ deterrence effect would be reduced, according to him.³⁸⁸ And Eugênio argued the same with respect to Dornelles’ reduction of the minimum fine.

Eugênio also rejected Dornelles’ reduction of administrator fines — both the maximum and the minimum fine — by arguing that it reduces the deterrent effect of the law.³⁸⁹

In addition, he argued that the imposition of more requirements to fine the administrator — that is, demonstration of wilful misconduct or gross negligence — might result in impunity. Eugênio argued that while the United States’ antitrust policy

³⁸⁵ Câmara dos Deputados, Parecer Pedro Eugênio <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=928019&filename=PSS+1+PL393704+%3D%3E+PL+3937/2004> Accessed 22 November 2016.

³⁸⁶ Ibid 45.

³⁸⁷ Ibid.

³⁸⁸ He also argued that the establishment of the higher percentages seems to be adequate from a comparative perspective. Ibid 46.

³⁸⁹ Ibid.

prioritises the criminal liability of individuals (even with prison) when it comes to cartels, Brazil would be reducing the ‘pressure’ on individuals who are, after all, the ones who decide to take the anticompetitive practices.

In sum, he had one concern about *excessive* punishment; and five concerns about *insufficient* punishment, when it comes to fines for anticompetitive practices.

Exclusive dealing as a possible abuse of dominant position practice

Eugênio rejected Agripino’s amendment that excluded exclusive-dealing agreements from the list of anticompetitive practices. He basically argued that companies with large market share can make exclusive-dealing agreements that have the potential to close the market to competitors, and that Cade has condemned the practice in some important cases.³⁹⁰ Therefore, he was concerned about *insufficient* punishment.

Merger control

Eugênio also opined for the rejection of Dornelles’ amendment that changed the criteria for the mergers’ submission.

Firstly, Eugênio rejected the increase of the minimum revenue criteria — from R\$ 400 million and R\$ 30 million, to R\$ 1 billion and R\$ 40 million.

He claimed that Dornelles’ argument that ‘the R\$ 400 million criterion of the 1994 law should be updated due to inflation, by using the Extended National Consumer Price Index — IPCA’ should not be accepted because the appreciation of corporate assets may not have followed the appreciation of the IPCA. Moreover, by using the R\$ 1

³⁹⁰ Ibid 44.

billion criterion, mergers that were cleared *with conditions* by Cade in 2010 would not have had been reviewed by the competition authority. Similarly, Eugênio argued that the R\$ 1 billion criterion would significantly reduce the universe of companies that will come under the scrutiny of Cade: only about 450 Brazilian companies have had a turnover of R\$ 1 billion [in 2010].

In addition, Eugênio argued, the increase of the second threshold from R\$ 30 to 40 million would prevent the review of mergers in which a large company progressively acquires medium-sized corporations, until it entirely eliminates competition in a given relevant market. According to him, ‘this [the thresholds at R\$ 1 billion and R\$ 40 million] means that a significant portion of the Brazilian economy will be unprotected from preventive competition enforcement’.³⁹¹

Secondly, Eugênio rejected the part of Dornelles’ amendment that gave antitrust immunity for associative contracts, consortia or joint ventures created for a temporary specific project. He argued that these agreements might facilitate the exchange of information between competitors, facilitating cartels; or might be created to avoid merger control (for him, it is very plausible that some association contracts, consortia or joint ventures that are intended to be permanent, end up appearing ‘temporary’ just to escape Cade’s merger review).³⁹²

Thirdly, Eugênio accepted the part of Dornelles’ amendment that gave immunity for consortia formed for public bids. Not because they do not have the potential to harm competition, however. For Eugênio, the potential competition problem is independent of the consortium: for example, the owner of the concession of a highway should not be able to bid for the concession of another road that is parallel to the first one in most of its length; regardless of whether there is a consortium or not. Nevertheless, the most

³⁹¹ Ibid 52.

³⁹² Ibid 54.

effective form of intervention, according to Eugênio, would be *ex ante* within the sphere of the call for tenders/bids, which run off the conventional format of Cade's merger review. Therefore, the Secretary for Economic Affairs, SEAE (acronym in Portuguese for *Secretaria de Acompanhamento Econômico*) of the Ministry of Finance would be better institutionally suited to advocate for competition within the sphere of the call for tenders/bids.³⁹³

Lastly, Eugênio accepted the part of Dornelles' amendment that established the submission of mere corporate capital restructuring. Although Eugênio was concerned about *excess* merger control (he argued that mere corporate capital restructuring should not be submitted for Cade's review due to its lack of impact on competition), he concluded that Cade can edit a resolution, as it has done in the past, regulating corporate capital restructuring immunity.³⁹⁴

In short, Eugênio was concerned about *insufficient* merger control when it comes to the minimum revenue criteria for both the main company and the second company; *insufficient* merger control when related to mergers aimed to a temporary specific project; *insufficient* merger control when it comes to public bids (though he concluded that SEAE should be the institution accountable for it); and *excess* of merger control when it comes to more corporate capital restructuring (though he concluded that Cade could edit a resolution granting immunity to that kind of deals).³⁹⁵

³⁹³ Ibid 55.

³⁹⁴ Ibid 55.

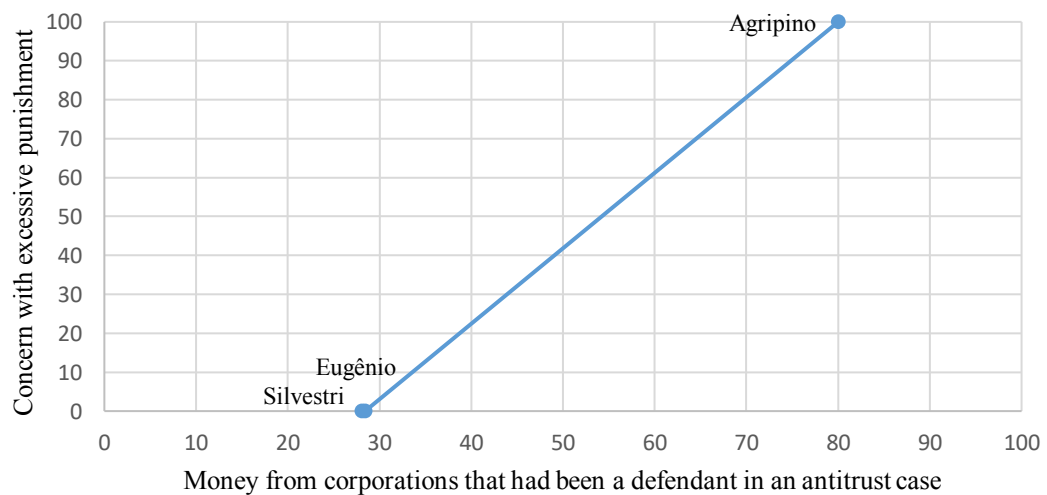
³⁹⁵ It is noteworthy that Eugênio's pattern — of predominant concern about insufficient punishment in cartel and abuse of dominance cases, and insufficient merger control — remained while he analysed other amendments that do not relate directly with those issues but that may relate indirectly. That occurred when he addressed the provisions that established the procedural norms of the legislation: eg, he was against the Senate's amendment that made more flexible the guarantee required to contest Cade's fines in the judiciary (for Eugênio, the Senate's amendment could turn Cade's decisions entirely ineffective, extending the harm caused by the anticompetitive conduct) (48–49). Eugênio also maintained this same pattern while analysing provisions related to institutional organisation that could indirectly weaken or strengthen Cade enforcement: for instance, he was against the provision that established the subsidiarity of antitrust law in relation to the laws of regulatory agencies (39–40).

5.3.3. The pattern between campaign finance and amendments

With respect to the list of anticompetitive practices and the fines for anticompetitive practices, we may observe that there is a clear correlation between money and the concern about excessive antitrust intervention (figures 5.1 and 5.2):

Figure 5.1

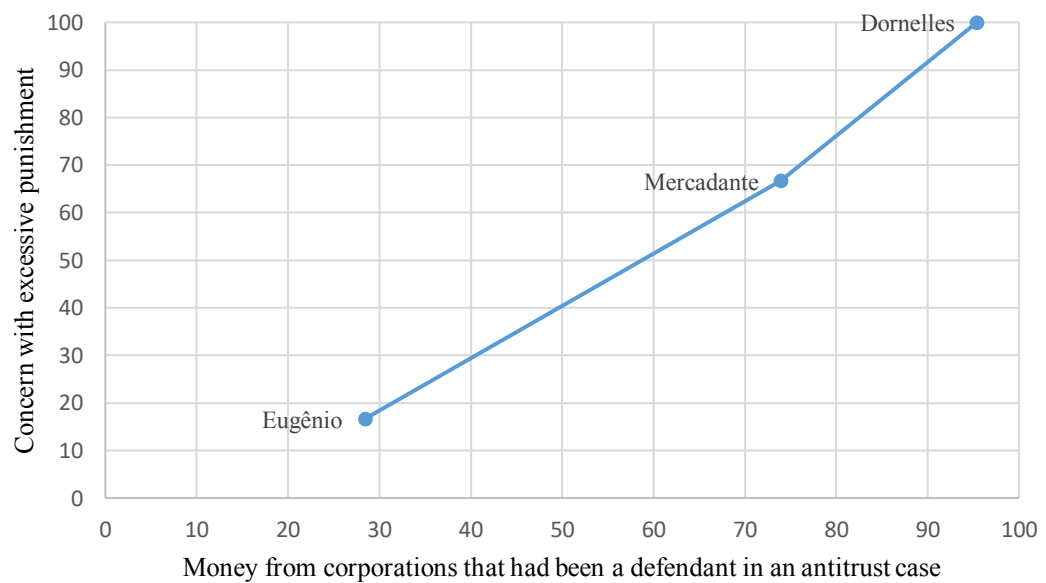
List of anticompetitive practices		
	Percentage of campaign fund from companies that had been a defendant in an antitrust case	Percentage of justifications manifesting concern with excessive punishment when proposing amendments
Silvestri	28.05	0
Eugênio	28.42	0
Agripino	80.01	100



There are other amendments proposed by Eugênio that I have not considered here because it is unclear if the provisions would positively or negatively impact the ‘punishment on cartel and abuse of dominance cases, and merger control’.

Figure 5.2

Fines for anticompetitive practices		
	Percentage of campaign fund from companies that had been a defendant in an antitrust case	Percentage of justifications manifesting concern with excessive punishment when proposing amendments
Eugênio	28.42	16.66
Mercadante	73.91	66.66
Dornelles	95.40	100



But, with respect to the criteria for submission of mergers to Cade's review, there is no clear correlation between money and the concern about excessive merger review (figure 5.3):

Figure 5.3

Submissions of cases to merger review		
	Percentage of campaign fund from companies that had been a defendant in an antitrust case	Percentage of justifications manifesting concern with excessive punishment when proposing amendments
Eugênio	28.42	20
Mercadante	73.91	100
Dornelles	95.40	75



The lack of correlation in the chart above might be due to a limitation of the method I have used: it does not consider that Mercadante proposed an amendment to increase the threshold to R\$ 400 million, while Dornelles proposed an amendment to increase the threshold to R\$ 1 billion. That is, Dornelles, who received more money, introduced a higher threshold than Mercadante, who received less money. In any event, neither Mercadante nor Dornelles' amendments had much impact on the final version of the bill, as we will see next. Therefore, I will not consider the amendments concerning submissions of merger review due to the lack of a clear correlation between corporate money and congressmen behaviour on this matter, and due to the little impact of Mercadante and Dornelles' amendments concerning merger control on the final version of the bill.

5.3.4. The impact of the amendments

As the public law scholar J. A. G. Griffith once wrote,

In the examination of institutions like the House of Parliament, statistics may be more than usually misleading. In considering such amendments moved to a bill, what is important is their relative effect on the bill, not their number.³⁹⁶

³⁹⁶ John Aneurin Grey Griffith, *Parliamentary Scrutiny of Government Bills* (Allen and Unwin for PEP and the Study of Parliament Group 1974) 14.

In our case study, the amendments proposed by the heavily corporate funded congressmen had a *full impact* on bill n 3937/2004 so far as anticompetitive practices are concerned. I am not claiming that the amendments were the *sole* factor that made the legislation less interventionist. In other words, I am not claiming that they were the *exclusive* cause — actually, there is no such thing in real life, as many philosophers of science have argued. Or, to put it in another way: I am not claiming that the amendments explain everything about the legislative process of the Competition Act. I am saying that they are a *key* element of that explanation. For instance, we may note that almost all other congressmen did nothing to try to stop the amendments. However, those kinds of factors are difficult to grasp because they lack evidence on why such a thing (for example, the omission of other congressmen) occurred. Consequently, our analysis would become more speculative. By contrast, the amendments are not only graspable but also explicitly justified by the congressman, as we have seen.

Agripino's amendment to exclude exclusive-dealing agreements from the list of anticompetitive practices had full effect. Although Eugênio rejected it, the amendment ended up being accepted by the party leaders. Consequently, Agripino's amendment became part of the Competition Act.

Likewise, Dornelles' amendment concerning the fine for anticompetitive acts had full effect. The Dornelles' amendment was key to shaping the Competition Act 2011, not only by reducing the minimum and maximum fines set forth in the Competition Act 1994 (from 1% and 30%, to 0.1% and 20%) for anticompetitive acts, but also by narrowing the fine's base calculation. While in the former legislation the fine was calculated in reference to the total gross pretax revenue of the company in the latest financial year, the new legislation now only considers the gross sales obtained in the field of the business activity in which the infringement took place.

The Dornelles' amendment also benefited company administrators.³⁹⁷ Firstly, administrators were benefited because the fine established for the administrator is a percentage of the fine established for the company. In other words, the fine applied to the company is the *base calculation* for the administrator's fine.³⁹⁸ Therefore, as the fine for the company was generally reduced, so it was the fine for the administrator. Secondly, the minimum and maximum percentages established for administrators were also reduced from 10% (minimum) and 50% (maximum) in the former legislation, to 1% (minimum) and 20% (maximum) in the new one.

It should be noted that press accounts reported that the approval (against Eugênio's wishes) of Dornelles' amendment regarding fines was a procedural mistake made at the Chamber (that is, they intended to reject, but a formal mistake was made, leading to its approval),³⁹⁹ while others reported that the party leaders at the Chamber of Deputies ended up agreeing with Dornelles.⁴⁰⁰ In any event, the fact is that the Chamber of Deputies approved Dornelles' amendment, which ended up shaping the final text on that matter.

While enforcing the new legislation,⁴⁰¹ Cade has recognised that the Act of 2011 is indeed more beneficial to corporations and their administrators when it comes to fines

³⁹⁷ On the other hand, those who do not exercise business activity had their fine increased. The fine for individuals, non-business public and private legal entities, as well as any association of persons and non-business de facto and de jure legal entities, was increased from a minimum of R\$ 18 thousand and a maximum of R\$ 18 million, to a minimum of R\$ 50 thousand and a maximum of R\$ 2 billion. We can speculate that companies did not lobby this matter, since corporations would lack legitimacy or interest to do so.

³⁹⁸ Artigo 23, inciso II, da Lei n° 8884/94. Artigo 37, inciso III, da Lei n° 12529/11.

³⁹⁹ *O Estado de São Paulo* (São Paulo, 8 October 2011) B8.

⁴⁰⁰ Julio Wiziack and Filipe Oliveira, 'Pressão fez governo tirar poderes do Super Cade', *Folha de São Paulo* (31 May 2013) <<https://www1.folha.uol.com.br/mercado/2013/05/1287632-pressao-fez-governo-tirar-poderes-do-super-cade.shtml>> 16 February 2018.

⁴⁰¹ Cade has been doing that analysis particularly in cases opened during the Competition Act 1994 but concluded when the Competition Act 2011 was already in force, to decide which legislation is more beneficial to the defendants and, therefore, should prevail.

regarding anticompetitive practices.⁴⁰² The point is: corporations and their administrators have, in practice, benefited from Dornelles' amendments.

Finally, another amendment proposed by Dornelles also benefited administrators: the competition authority now needs to demonstrate that the administrator acted with wilful misconduct or gross negligence, while in the former legislation Cade only had to demonstrate strict liability.⁴⁰³

On the other hand, Mercadante and Dornelles' amendments with respect to *merger review* had *little impact* on the final version of the bill. Mercadante's amendment was completely changed by Dornelles. And Dornelles' amendment, in turn, was rejected by Eugênio to a significant extent. While Eugênio accepted the parts of the Dornelles' amendment concerning the merger control of corporate capital restructuring, and concerning antitrust immunity for consortia formed for public bids; *Eugênio rejected the merger thresholds suggested by Dornelles, as well as the immunity for temporary associative contracts/consortial/joint ventures*. The party leaders at the Chamber of Deputies agreed with Eugênio's opinion on those matters, so Eugênio's rejection was approved by the plenary of the Chamber, eventually shaping the final text.

⁴⁰² See commissioner Ana Frazão's opinion in the Processo Administrativo nº 08012.009834/2006-5, Rel Cons Ricardo Ruiz, fls 734–738. As pointed out by Mrs Frazão, although the legislation changed from 'revenue of the company' to 'revenue of the company, group or conglomerate', this change was merely rhetorical, since Brazilian jurisprudence and scholarship had already consolidated the view that corporate groups must be considered as one company, even if composed of several distinct legal entities. Moreover, although the previous legislation considered the fine based on the gross sales after tax and the new one establishes the fine based on the pretax gross revenue (which partially increases the base calculation), this increase is marginal and has little impact on the fine vis-à-vis the changes on the percentage and the major aspect of the base calculation (ie, the change from the 'total revenue of the company' to just the 'field of the business activity on which the infringement'), as has been recognised by Cade case law grounded on commissioner Frazão's opinion. For discussion and summary of the Cade case law on this matter, see Flávia Chiquito dos Santos, 'Aplicação de Penas na Repressão a Cartéis: Uma Análise da Jurisprudência do CADE' (Dissertação de Mestrado em Direito, Universidade de São Paulo 2014) 160.

⁴⁰³ For a discussion about that change in the legislation, see Maria Cecília Andrade, Caroline Sanselme Vieira, and Ricardo Ferreira Pastore, 'A responsabilidade dos administradores perante a Lei de Defesa da Concorrência e o Programa de Prevenção de Infrações à Ordem Econômica' *Migalhas* (28 May 2004) <<http://www.migalhas.com.br/dePeso/16,MI4858,31047-A+responsabilidade+dos+administradores+perante+a+Lei+de+Defesa+da>> accessed 22 November 2016.

5.3.5. Conclusion of the section

In sum, we have seen the following pattern: *the more money the elected congressman received from companies that had been a defendant in an antitrust case, the more he tended to be concerned about excessively punishing companies when proposing or rejecting amendments in the consolidated competition bill on issues that involved the list of anticompetitive practices and the fines for anticompetitive practices.* In other words, the more corporate donations a congressman received from companies that had been a defendant in an antitrust case, the more he tended to argue for a less interventionist competition legislation regarding the list of anticompetitive practices and the fines for anticompetitive practices, in accordance with the interests of the CNI.

This pattern has impacted the final version of the competition bill, shaping the text of the Competition Act 2011 with respect to anticompetitive practices.

In the following section, I will explore possible explanations for the pattern found.

5.4. The possible explanations for the pattern found

I will now try to understand the pattern found in our case study through four perspectives: (a) corruption of the legislators' attitude, (b) war chest corruption, (c) the possibility of a mere coincidence, and (d) the nature of the houses of Congress. I will engage with the empirical literature on Brazilian campaign finance, to see the extent to which it can help us explain the pattern found in the case study.

5.4.1. The corruption of the legislators' attitude

The association between corporate contributions and political benefits

If we want to understand whether corporate donations have corrupted the attitude of legislators (either through *quid pro quo* or dependence corruption), it is necessary to look at what political science statistical studies tell us. Political scientists have frequently asked whether contributions buy political favours in Brazil. And, in a nutshell, at least five papers⁴⁰⁴ have found a statistically significant association between corporate contributions and subsequent political benefits from the federal government in general, such as obtaining government contracts,⁴⁰⁵ tax benefits,⁴⁰⁶ and finance from public banks.⁴⁰⁷

⁴⁰⁴ The research for this section was mostly done in 2016. I have used Wagner Mancuso's article as a reference and starting point to my review of political science literature on campaign finance. Wagner Mancuso, 'Investimento Eleitoral no Brasil: Balanço da Literatura (2001–2012) e Agenda de Pesquisa' (2015) 23 *Revista de Sociologia e Política* 155.

⁴⁰⁵ Boas, Hidalgo and Richardson have found positive association between corporate contributions to elected deputies of the Workers Party in 2006 and subsequent construction contracts with the government. They claim that 'firms specializing in public-works projects can expect a substantial boost in contracts — at least 14 times the value of their contributions — when they donate to a federal-deputy candidate from the ruling Workers' Party (PT) and that candidate wins office'. T C Boas, F D Hidalgo and N P Richardson, 'The Spoils of Victory: Campaign Donations and Government Contracts in Brazil' (2014) 76 *Journal of Politics* 415.

⁴⁰⁶ Maetê Gonçalves have found that the industries that obtained tax social contribution during Lula's administration — aerospace, beverage, construction, pharmaceutical, and petrochemical industries — all donated to his campaigns or to the Workers' Party during the 2002 and 2006 elections. Maetê P Gonçalves, 'Financiamento Político e Benefícios Tributários: Uma Análise da Atuação de Setores Contemplados com Benefícios Tributários no Financiamento de Campanhas Eleitorais (2003–2010)' (2011) 35º *Encontro da Anpocs*.

⁴⁰⁷ According to Stijn Claessens, Erik Feijen and Luc Laeven, companies that made contributions to (elected) federal deputies in the 1998 and 2002 elections had their public bank leverage substantially increased during the four years following the elections, which 'suggests that contributing firms gained preferential access to [public] finance from banks'. Stijn Claessens, Erik Feijen and Luc Laeven, 'Political Connections and Preferential Access to Finance: The Role of Campaign Contributions' (2008) 88 *Journal of Financial Economics* 554 577.

Similarly, Sérgio Lazzarini and others concluded in their paper that 'politically-connected firms [ie campaign donors] are also more able to obtain BNDES [Brazilian Development Bank] loans' while analysing the 2002 and 2006 elections. Sérgio G Lazzarini and others, 'What Do Development Banks Do? Evidence from Brazil, 2002–2009' (2011) Harvard Business School Working Paper n 12-047 30.

And Danylo Rocha, in the same sense, has found a correlation between BNDES' expenditures in Lula's second mandate (2007–2011) and the funding of the national campaign of the Workers' Party (PT) in the second half of 2010. Danylo Rocha, 'Relações entre Dispendios do BNDES e Financiamento Eleitoral no Governo Lula: Uma Análise Empírica' (2011) 35º *Encontro da Anpocs* 14.

But there is a problem with causation. Perhaps the politician (and the part of the state to which he had influence) behaved in favour of the corporation because of ideological reasons, for example. Under this view, companies might have donated to the politician because of his ideology (a pro-business one, or sympathetic to a certain economic sector or a type of company). The more a politician has ideological affinities with corporations, the more he attracts corporate money. This might be a problem of fair competition in elections, and not of corruption of legislators' attitude.⁴⁰⁸

The attempt to overcome part of the causation problem

A paper by Santos and others has tried to overcome part of the causation problem, by isolating money from ideology. That is, they considered both money and ideology as independent variables, and analysed the money variable while controlling the ideology variable. They also controlled a variable that they called 'background', that is, if the politician was a businessman before joining politics.

But they found two conflicting results. On the one hand, they found a positive association between corporate contributions *in general* (that is, from both the industrial and service sectors) and cooperation in matters of the interest of CNI.⁴⁰⁹

Araújo, on the other hand, did not find significant association between campaign contributions and protection tariffs — which 'does not mean, however, that this relationship does not exist', in the words of the author, since he acknowledges that he may have chosen the wrong variable (campaign donations for Lula/PT's campaign for president in 2002). Gustavo Batista Araújo, 'O Déficit entre Acordado e Realizado no Mercosul' (Dissertação de Mestrado em Ciência Política, Universidade de São Paulo 2008) 94.

⁴⁰⁸ It is noteworthy that corporate money can *reinforce* the already pro-business ideology. In this case, there is a dependence corruption problem, since money would have impacted the politician's behaviour.

⁴⁰⁹ Manoel Leonardo Santos and others, 'Financiamento de Campanha e Apoio Parlamentar à Agenda Legislativa da Indústria na Câmara dos Deputados' (2015) 21 *Opinião Pública* 33 51. The authors analysed the behaviour of 1,171 congressmen, totalling 9,903 votes in the plenary.

On the other hand, when they looked exclusively at donations from the industrial sector (thus excluding those from service sectors), their results did *not* show a positive correlation between donations and cooperation in matters of the CNI's interest. The authors speculated that this negative association may have occurred due to errors in their variables: for example, they might have made mistakes while identifying which companies are indeed from the industrial sector.⁴¹⁰

If we assume their explanation to be plausible and consider their statistically significant finding as a strong one, their article has much to inform our discussion, since both our case study and their paper have concluded that the proportion of corporate money received correlated with a politician's behaviour in favour of the interests of CNI. Although there are differences between the studies — while they focus on nominal voting of deputies between 1999 and 2007, our case study focuses on amendments proposed by deputies and senators between 2008 and 2011 — we can argue that money would similarly impact a deputy between 1999 and 2007 while voting, and a deputy or senator between 2008 and 2011 while proposing an amendment.

Other possible factors

We should also assure that other factors have not affected the politician's behaviour.

For instance, political science literature on American elections suggests that if the bill was 'significantly exposed to public opinion', this might restrain the politician from following their donor's interests.⁴¹¹ If the bill is exposed to public opinion, the argument follows, this undermines the influence of campaign funding on the actions of

⁴¹⁰ Ibid 48.

⁴¹¹ For references, see *ibid* 41.

parliamentarians because, under the scrutiny of the general public, the issue arouses the interest of multiple groups, who are directly or indirectly affected by the decision. Ultimately, these multiple interests increase the costs to the congressman if he supports an issue that may displease his constituency.⁴¹²

Similarly, another set of political science papers have argued that money impacts politicians mainly in technical and specialised topics, because they usually pass off the public interest, and scrutiny by uninformed groups is harder due to complexity (asymmetry of information).⁴¹³

It is hard to tell the extent to which the provisions we discussed in our case study are ‘technical and specialised’, or technical enough to be ignored by the public interest and the scrutiny of uninformed groups. However, it seems that the media did not report on competition bill n 3937/2004 to a degree that affected public opinion. It would be highly unlikely people going to the streets in order to protest in favour of a more or less interventionist antitrust law — as, in fact, they did not. Nor was there any significant debate about the bill on broadcast, in the press or on social media. Moreover, there are no reports of lobbying from interest groups — other than CNI — on the bill. Therefore, *competition bill n 3937/2004 seems to not fit in the category of bills that were significantly ‘exposed to the public opinion’.*

⁴¹² Politicians seem to consider both their donors’ and voters’ interests while voting in parliament, proposing amendments, and so on. So why would politicians follow donor interests? They follow because money usually matters for electoral success, as we will see in the next subsection. Donations help politicians to pursue more votes, by enabling the candidate to buy access to the media, transportation (the Brazilian states are large geographically), staff, and so on. If this assumption (that money matters) is right, there might be two explanations for why politicians would follow their donors’ interests. Firstly, politicians are frequently trapped by a repetition game. Thus, if the politician wants to get re-elected, or run for another office in the future, he will need money again, in order to have a competitive candidacy. A second explanation would be that it might be normal — ie, human — to have some sense of gratitude to those who helped you to achieve your goal, which might (perhaps even psychologically) influence the politician’s sense of public interest.

⁴¹³ For references, see Santos and others, ‘Financiamento de Campanha e Apoio Parlamentar à Agenda Legislativa da Indústria na Câmara dos Deputados’ 41.

But humans are complex, and may have different perspectives on the same phenomenon. For instance, it is possible that Eugênio thought that the bill was sufficiently exposed by the media, and decided that it would be a better strategy to vote according to his view of the public interest or his voters' view of the public interest. But say, on the other hand, that another congressman thought that the bill was *not* sufficiently exposed by the media, and decided it would be a good opportunity to please his donors. However, in this case, we still have a problem, since money would have impacted the congressman's behaviour — I am not discussing here a *quid pro quo* practice, but rather a problem of dependency.

Finally, it should be noted that although unequal lobbying conditions — such as the collective action problem⁴¹⁴ — might explain the overall success of bills that concern business, it does not explain different behaviours among politicians on a given bill. It does not explain why the politicians' proportion of convergence with business interests correlates with the proportion of money received.

Conclusion

If we accept the justification of Santos and others for their conflicting results, their paper might help to corroborate the hypothesis that corporate money impacted congressmen's behaviour in the legislative process of competition bill n 3937/2004.⁴¹⁵

⁴¹⁴ So far as the competition bill is concerned, businesses usually have small and organised groups, while final consumers are more diffuse. Another possible inequality in lobbying conditions is that business usually have more resources than other interest groups to spend on lobbying. See section 1.2.

⁴¹⁵ We still do not know how exactly the donation affects the congressmen's behaviour in Brazil. Do contributions buy more access to the politician? Perhaps the lack of lobbying regulation (and thus data) harms the feasibility of empirical studies on this subject. See Mancuso, 'Investimento Eleitoral no Brasil: Balanço da Literatura (2001–2012) e Agenda de Pesquisa' 175. In the US, the literature suggests that money indeed buys more access to politicians. See Richard L Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections* (Yale University Press 2016) 54.

The context of our case study apparently rejects the influence of other potential factors: for instance, the competition bill was not significantly exposed to public opinion.

But even if we discard Santos and others' article due to its conflicting conclusions, we still have four other papers that found statistically significant associations between corporate donations and subsequent political benefits. And those statistical studies may help to corroborate the hypothesis that the pattern found in our case study might be either a matter of corruption of the politician's attitude or a matter of war chest corruption, which will be analysed in the subsection below. That is, there is a chance that either (i) politicians' dependence on corporate donations helped business to achieve desirable political outcomes, or (ii) the congressmen already had a pro-business ideology, and, for that reason, they received more corporate donations.

5.4.2. The war chest corruption

Money matters

The other main question that political scientists have asked while studying Brazilian political finance is whether money results in votes and electoral victory. Perhaps the best conclusion to date is that money is an important factor to win elections, but not the only factor, since political capital and 'candidate quality' play a significant role.⁴¹⁶ Money is usually *necessary*, but not *sufficient*.⁴¹⁷

⁴¹⁶ Bruno Speck and Wagner Mancuso, 'Financiamento, Capital Político e Gênero: Um Estudo de Determinantes do Desempenho Eleitoral nas Eleições Legislativas Brasileiras de 2010' (2012) XXXVI Encontro Anual da ANPOCS, Águas de Lindoia/SP. Daniel Marcelino, 'Sobre Dinheiro e Eleições: Um Estudo dos Gastos de Campanha para o Congresso Nacional em 2002 e 2006' (Dissertação de Mestrado em Estudos Comparados sobre as Américas, Universidade de Brasília 2010) 93.

According to Mancuso, the statistically significant association between money spending and the amount or proportion of votes received by candidates in Brazil is one of the most solid findings in the literature — for discussion and references, see Mancuso, 'Investimento Eleitoral no Brasil: Balanço da Literatura (2001–2012) e Agenda de Pesquisa' 159. Similarly, papers showed statistical evidence of

The predominance of corporate funding

As we have seen in chapter three, between the 1994 and 2014 general elections, corporations were the chief providers of this essential item (that is, money) for candidates.⁴¹⁸

In each of the general elections that occurred during this period, corporate donations have accounted for more than at least 62% of Brazilian political party and candidate total funding.⁴¹⁹ In contrast, no other source (that is, donations from individuals, use of own resources or public funding) accounted for more than 20% of the parties and candidates' total funding, during the same period.⁴²⁰

All congressmen analysed in our case study were elected during that period: senators Agripino and Mercadante in 2002; senator Dorneles and deputy Silvestri in 2006; and deputy Eugênio in 2010.

associations between spending and electoral victory — ie, the candidate for Congress ending up being elected or re-elected — see, *ibid* 159. Though all these studies have shown that money matters, there is a problem with causation. On one hand the candidates who spend more money on campaigns are the ones who get more votes, but on the other hand those who have more political capital (eg, leadership within a party and loyal voters) or 'candidate quality' (for example, charisma to win votes and ability to avoid gaffes) may attract more money. In other words, a candidate wins more votes because she received more money, or she receives more money because she can win votes? See Wagner Mancuso, 'Fórum Brasilianas — Eleições 2012 — Wagner Pralon' (*Brasilianas*, 26 September 2012) at 10:00 <<https://youtu.be/wIsKLFkQLC0>> accessed 22 November 2016.

But political capital or 'candidate quality' alone seems to be usually insufficient to win federal legislative elections in Brazil. Very few candidates are successful spending little money. Only those who have very strong grassroots (a few left-wing candidates, religious pastors, and so forth) and candidates who are in the media (celebrities, broadcasters, and so on) usually win elections with little money. Candidates who are celebrities or have strong grassroots are clear exceptions. See Mancuso, 'Fórum Brasilianas.org — Eleições 2012 — Wagner Pralon'.

⁴¹⁷ As in the United States, according to Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*, 42.

⁴¹⁸ Carazza, 'Interesses Econômicos, Representação Política e Produção Legislativa no Brasil sob a Ótica do Financiamento de Campanhas Eleitorais' 48.

⁴¹⁹ See, Carazza, *Dinheiro, Eleições e Poder: As Engrenagens do Sistema Político Brasileiro*, 43. According to calculations from Justice Dias Toffoli, that number would be 65%. See Min Dias Toffoli, STF, ADI 4650/DF, Inteiro Teor do Acórdão 88.

⁴²⁰ Carazza, 'Interesses Econômicos, Representação Política e Produção Legislativa no Brasil sob a Ótica do Financiamento de Campanhas Eleitorais' 48. Min Dias Toffoli, STF, ADI 4650/DF, Inteiro Teor do Acórdão 88.

The concentration of corporate funding on conservative parties and their candidates

Corporate contributions were made mostly to conservative parties and their candidates, as empirical studies have found. David Samuels found that candidates from left-wing parties received fewer campaign contributions in general and fewer contributions from corporations than other candidates/parties in the 1994 and 1998 elections for the Chamber of Deputies.⁴²¹ Similarly, Cláudio Weber Abramo found that, during the 2010 elections, top-donor companies donated to all parties (from right-wing to centre-left parties), except the ones on the hard left.⁴²² This last finding converges with Mancuso and others' finding that candidates of right-wing parties received more corporate donations than those of the left in the elections for the Chamber of Deputies in 2010.⁴²³ There are *no* studies showing the contrary — that is, that left-wing parties were the ones who received more corporate donations in elections for the Congress (or one of its Houses), in any election.

The imbalance in contributions results in an imbalance in spending. For instance, Lemos, Marcelino and Pederiva have found that candidates of parties with conservative features (DEM/PFL, PSDB and PMDB) spent much more than candidates of the centre-left PT and PDT during the 2002 and 2006 elections for Congress.⁴²⁴

⁴²¹ David Samuels, 'Money, Elections, and Democracy in Brazil' (2001) 43 *Latin American Politics and Society* Latin American Politics and Society.

⁴²² Cláudio Weber Abramo, 'As Rotas das Doações Eleitorais' (2014) *Transparência Brasil* 2.

⁴²³ Wagner Mancuso and others, 'Corporate Dependence in Brazil's 2010 Elections for Federal Deputy' (2016) 10 *Brazilian Political Science Review*.

⁴²⁴ Leany Barreiro Lemos, Daniel Marcelino and João Henrique Pederiva, 'Porque Dinheiro Importa: A Dinâmica das Contribuições Eleitorais para o Congresso Nacional em 2002 e 2006' (2010) 16 *Opinião Pública* 366 389.

The limitations of the statistical studies

Although the empirical studies have demonstrated an imbalance in the electoral competition, as far as I am aware no statistical study has unquestionably shown the occurrence of war chest corruption: that is, proven that political advertisements paid with corporate money indeed influenced the behaviour of voters.

Moreover, as far as I am concerned, there are no statistical studies confirming that the politician's ideology, when considered *individually*, affects his performance (particularly in the proposal of amendments, which is what concerns us here). For instance, although the article from Santos and others found that the 'rightmost the congressman is placed on the ideological spectrum, the more likely he will cooperate with the interests of the CNI in the nominal voting'; they determined the ideology of the politician *based on his party*.⁴²⁵ In this aspect, their article has little to further inform our case study — in fact, we have shown that senator Mercadante and deputy Eugênio were both from the Workers' Party and yet had different attitudes when proposing amendments.⁴²⁶ The finding from Santos and others may only be helpful to us when trying to understand why the amendments have passed. That is, it may help to explain the distribution of power within Congress that made it possible to pass the amendments: if more left-wing parties had more seats, perhaps the amendments would not have passed.

⁴²⁵ Santos and others, 'Financiamento de Campanha e Apoio Parlamentar à Agenda Legislativa da Indústria na Câmara dos Deputados' 49. The ideological positioning of the deputies in the left-right scale was based on data from Power and Zucco, which measured the average ideology of the political parties. The scale goes from 1 to 10, being completely left the parliamentary position 1 and fully right parliamentary at position 10. Ibid 45. For Power and Zucco's methodology and data, see Timothy J Power and Cesar Zucco, 'Elite Preferences in a Consolidating Democracy: The Brazilian Legislative Surveys, 1990–2009' (2012) 54 *Latin American Politics and Society* 1.

⁴²⁶ In this way, Graziella Testa argues that congressmen seem to have more freedom to act in the committees (when proposing or rejecting an amendment) than in the plenary of the houses, where they are more constrained by the orders of the party leaders on how to vote towards a bill. See Politiquês Nexo Jornal podcast, 'A importância das comissões temáticas no Congresso' (17 February 2019) <<https://www.nexojornal.com.br/podcast/2019/02/17/A-import%C3%A2ncia-das-comiss%C3%B5es-tem%C3%A1ticas-no-Congresso>> accessed 19 February 2019.

Conclusion

In sum, between the 1994 and 2014 general elections, companies hugely impacted the level playing field of political competition, to benefit candidates and parties that were ideologically aligned with business interests. Thus, the congressmen who participated in the lawmaking of competition bill n 3937/2004 were elected through competitions that had been imbalanced by corporate donations.

It is difficult to prove that this imbalance has impacted the results of the elections. As far as I am aware, no statistical study has done it so far. Thus, war chest corruption is *apparent*. Moreover, there are no statistical studies confirming the intuitive perception that ideology affects the behaviour of congressmen while proposing amendments, which is what concerns us.

That said, although we cannot affirm that the apparent war chest corruption explains the pattern we have found, we cannot rule it out either.

5.4.3. The possibility of coincidence

We should also consider if the pattern found in our case study could be explained by coincidence. For instance, those congressmen might have coincidentally favoured corporations because of the privileged position that companies hold in capitalist democracies. More specifically, they might have favoured business because they believe in the key role that corporations have in generating jobs, promoting growth, controlling inflation, generating production, tax revenues, and so on.⁴²⁷

There might be two main arguments to reject this possibility.

⁴²⁷ For a brief discussion of the privileged position that companies possess in capitalist democracies, see chapter one.

Firstly, there might be a pattern on the concern with companies. As Charles Lindblom pointed out, ‘clearly businessmen have commonly demanded of government more indulgences than are actually necessary to motivate their required performances’; and ‘as some of these indulgences have been taken away, their performance has not faltered’.⁴²⁸ In this sense, most business requests are quite controversial.⁴²⁹ And *ideology* plays a key role in solving those controversies — that is, if the business demands are plausible or not.

The matters amended in our case study fall in this grey area: it is very controversial whether antitrust legislation should consider exclusive-dealing agreements as being anticompetitive, and what the fines for cartel and abuse of dominant cases should be.

Perhaps our intuition tells us that, the rightmost the congressman’s ideology, the more pro-business he tends to be; although, as mentioned in the previous subsection, there are no empirical studies confirming that the ideology of the politician (when considered the ideology of the politician *individually* and not the ideology of his *party*), affects his attitude towards bills that concern corporations.

Secondly, another argument to try to reject the possibility of coincidence is the fact that the pattern found in our case study is aligned with the finding from Santos and others that the *higher the proportion of resources from companies*, the greater the *cooperation of the deputies in matters of interest to the industry*.⁴³⁰ This finding from Santos and others is statistically significant (although not all models applied by the

⁴²⁸ Lindblom, *Politics and Markets: The World's Political-Economic Systems*, 177.

⁴²⁹ Some business requests might be more controversial than others. For instance, if a business organisation currently requests a complete absence of antitrust legislation, as the Trade Association of São Paulo did in 1961, very few would think that the demand is plausible. By contrast, regulating the abuse of dominant position practices is typically very controversial.

⁴³⁰ Santos and others, 'Financiamento de Campanha e Apoio Parlamentar à Agenda Legislativa da Indústria na Câmara dos Deputados'.

authors have confirmed it). Due to the similarity between the conclusion of our case study and the conclusion of Santos and others, this might be an indication that our finding is not a matter of coincidence.

That said, this second argument also does not rule out the alternative of mere coincidence, because the correlation found in our case study cannot be submitted to statistical scrutiny.

5.4.4. The nature of the houses of Congress

Finally, one could argue that the different pattern between deputies (Eugênio and Silvestri) and senators (Mercadante, Dornelles, and Agripino) can be explained by the nature of their houses. Historically, the Senate is the legislative house that has had a ‘moderator’ role (senators have an eight-year mandate, and its renewal is alternated, thus only half of the Senate is renewed every four years), in order to block abrupt turns that may occur through a radical change in the composition of the Chamber of Deputies, which renews all its members every four years.⁴³¹

Nonetheless, competition bill n 3937/2004 was not introducing any sudden change to the law so far as the provisions regarding anticompetitive acts were concerned.

Firstly, the Competition Act 1994 already had established the maximum fine for anticompetitive acts as 30% of the total revenues of the company, excluding taxes, in the previous year to the filing of the lawsuit. Thus, competition bill n 3937/2004 was not introducing any innovation in this aspect, before Dornelles proposed his amendment to

⁴³¹ José Luiz Quadros de Magalhães, 'Bicameralismo e Unicameralismo' Doutrina Programa de Pós-Graduação em Direito UFRGS.

reduce the maximum fine to 20% of the gross sales obtained in the field of the business activity on which the infringement took place in the latest financial year.

Secondly, exclusive-dealing agreements have repeatedly been condemned by Cade since 1999, with the competition authority applying the rule of reason in each case.⁴³² And competition bill n 3937/2004 was doing nothing more than translating that consolidated procedure into the text of the legislation.⁴³³ Therefore, the competition bill was not introducing any *de facto* novelty, before Agripino excluded the practice from the list of anticompetitive infractions.

Thus, senators Dornelles and Agripino were not preserving the *status quo* (in fact, Dornelles even changed the *status quo*). Therefore, the pattern found cannot be explained by the nature of their houses.

This is the only explanatory alternative which we can discard with more certainty.

⁴³² Processo Administrativo n° 08000.018480/97-28, Rel Cons Mércio Felsky <<http://anexos.radaroficial.com.br/b935345fe8aeec7f523483837f8bd83a.pdf>> Accessed 22 November 2016. Cade condemned exclusive-dealing practices in several cases. For instance, cases regarding Unimed, a physicians' cooperative and one of the largest health insurance companies in Brazil; those which involved 'radius clauses' imposed by shopping centres on their tenants (for example, the decision on the Processo Administrativo n° 08012.006636/1997-43, in 2007); and most famously the condemnation of AmBev, Brazil's largest beer producer with a 70% of market share, in 2009, imposing a record fine of R\$ 352m — ie, around £73m, (Processo Administrativo n° 08012.003805/2004-10). For a discussion about this topic, see Ana Paula Martinez, 'Abuse of Dominance: The Third Wave of Brazil's Antitrust Enforcement' (2013) 9 Competition Law International 169 172.

⁴³³ It is true that, although Agripino's amendment had full impact on the Competition Act, it may have little impact on the enforcement of the legislation, since the list of anticompetitive practices in the Act is not fully comprehensive, and Cade can condemn any practice (even if not listed) that has as an objective or may have the following effects, in spite of having been achieved: (i) limit, restrain or in any way injure free competition or free initiative; (ii) control the relevant market of goods or services; (iii) arbitrarily increase profits; or (iv) exercise a dominant position abusively. This procedure was already established in the Competition Act 1994, which enabled Cade to condemn exclusive-dealing practices in several cases.

5.4.5. Conclusion of the section

In sum, I have argued that we cannot rule out the possibility that the pattern found in our case study was a matter of coincidence. However, we also cannot discard the possibility that it was a matter of corruption of the congressmen's attitude or of war chest corruption.

5.5. Conclusion of the chapter

I tried to show that, throughout Brazilian history, business organisations have constantly lobbied against what they viewed as excessive interventions of antitrust bills. This has been the hegemonic business' lobbying, as far as the documentation collected for this chapter showed us.

The CNI, which is the largest and most important Brazilian business association, continued this lobbying tradition during the legislative process of the antitrust bill that resulted in the enactment of the Competition Act 2011. And, in accordance with CNI's lobbying, the more money an elected congressman received from companies that had been a defendant in an antitrust case, the more he tended to be concerned about excessively punishing companies when proposing or rejecting amendments on issues that involved the list of anticompetitive practices and the fines for anticompetitive practices. These amendments shaped the text of the Competition Act 2011.

Yet the correlation found may be a matter of coincidence because it could not be scrutinised through statistics.

Surely the data showed here also does not authorise us to make any claim about causation. In other words, I am not claiming that corporate donations 'bought' the above-mentioned amendments.

Nevertheless, I ask: did the data shown here *undermine* our ability to believe that corporate donations had nothing to do with a less interventionist Competition Act 2011? In my view, the answer is ‘yes’, because of the possibility that dependence or war chest corruption might explain the pattern found. This harms the confidence we have in the democratic integrity of one of the elements of Brazilian capitalism, that is, antitrust legislation.

Corporate donations may affect not only the enactment of legislation, but also its *enforcement*. This is what we shall turn to in the next chapter.

Chapter Six

The repercussion of elections on antitrust enforcement

6.1. Introduction

The year was 1971 and president Richard Nixon was at the White House speaking with Charles Colson, his special counsel, about the negative coverage that the main television broadcasters in the United States (ABC, NBC and CBS) were giving to his administration. During the conversation, Nixon argues that his administration should threaten the broadcasters with an antitrust suit to make the coverage more favourable:

If the threat of screwing them is going to help us more with their programming than doing it, then keep the threat ... Our gain is more important than the economic gain. We don't give a goddam about the economic gain. Our game here is solely political ... As far as screwing them is concerned, I'm very glad to do it.⁴³⁴

That same year, president Nixon allegedly attempted to settle an antitrust case involving the International Telephone & Telegraph Co (ITT) in exchange for campaign

⁴³⁴ Walter Pincus and George Lardner Jr, 'Nixon Hoped Antitrust Threat Would Sway Network Coverage', *Washington Post Staff Writers* (1 December 1997) <<http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm>> accessed 16 February 2018. See brief comments about the case in Ariel Ezrachi, 'Sponge' (2017) 5 *Journal of Antitrust Enforcement* 49 56.

finance contributions.⁴³⁵ But Nixon was not the only American president who reportedly attempted to use antitrust enforcement as a bargaining chip to gain resources for political competition: president Lyndon Johnson, for instance, allegedly promised DOJ (Department of Justice) clearance to a merger in exchange for a newspaper's political support.⁴³⁶

Attempts to use antitrust enforcement for political purposes are surely not exclusive to American antitrust history. This has happened in Europe.⁴³⁷ And also in Brazil, as it will be seen throughout this chapter.

In the last chapter, we have discussed if political finance has impacted the lawmaking of the Brazilian Competition Act of 2011.⁴³⁸ This chapter will discuss whether corporate donations have affected the *enforcement* of antitrust legislation. I will

⁴³⁵ George Lardner Jr, 'On tape, Nixon outlines 1971 'deal' to settle antitrust case against ITT', *The Washington Post* (4 January 1997) <https://www.washingtonpost.com/archive/politics/1997/01/04/on-tape-nixon-outlines-1971-deal-to-settle-antitrust-case-against-itt/246628a9-8abf-47f3-80ec-379569e0f350/?utm_term=.2a517172ea4d> accessed 16 February 2018. All of Nixon's conversations were recorded by an internal White House tape which later became public.

⁴³⁶ For a brief discussion of that case and other records of political pressures on American antitrust enforcement, see Steven C Salop, 'What Consensus? Why Ideology and Elections Still Matter to Antitrust' (2014) 79 *Antitrust Law Journal* 601 637. For a comprehensive analysis of the influence of American presidents on the DOJ, see James F Rill and Stacy L Turner, 'Presidents Practicing Antitrust: Where to Draw the Line?' (2014) 79 *Antitrust Law Journal* 577.

⁴³⁷ For instance, writing about European competition law, Maier-Rigaud argued that 'no attentive observer or competition practitioner either on the side of an authority or defending clients is able to overlook the highly political nature of large antitrust and merger cases'. Frank P Maier-Rigaud, 'On the Normative Foundations of Competition Law: Efficiency, Political Freedom and the Freedom to Compete', *The Goals of Competition Law* (ASCOLA Competition Law Series, Edward Elgar 2012) 167. In this sense, the then-commissioner Mario Monti for the Directorate-General for Competition reportedly said that one of his prime functions was to protect the merger task force from political pressure. Alec Burnside, 'GE, Honey, I Sunk the Merger' (2002) 23 *European Competition Law Review* 107. For reported examples of interference with the independent functioning of European National Competition Authorities (NCAs) on anticompetitive conduct cases, see European Commission, Commission Staff Working Document, 'Impact Assessment — Accompanying the document Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' SWD (2017) 114, 26 <http://ec.europa.eu/competition/antitrust/impact_assessment_report_en.pdf> accessed 16 February 2018.

⁴³⁸ Lei n° 12529/2011.

focus primarily on Cade, the Brazilian competition authority, which is an independent government agency.⁴³⁹

The first section will address how political finance might impact antitrust enforcement due to the democratic controls on Cade. To influence antitrust enforcement, elected politicians do not necessarily have to contact or exert pressure on Cade's officers — I will argue that the Presidency of the Republic and the Congress have channels to influence antitrust enforcement because Cade's powers are under democratic controls.

Subsequently, section 6.3 will explore situations in which elected politicians approach Cade's officers. In this sense, it will discuss the potential impact of the campaign finance over the pressure or contact made by politicians on the competition agency.

Since a few large corporate donors have dominated donations in the Brazilian federal elections,⁴⁴⁰ it is inescapable to take a closer look at how politicians have attempted to influence the antitrust enforcement of cases of their interests. Because the attempt to influence antitrust enforcement frequently involves not only a single company, but also a whole sector, I will focus on the five main economic sectors in terms of donations. This will be done in the last section of the chapter, 6.4.

I must say that I had good and bad luck while researching this chapter. To better understand the political pressure on Cade, I had the idea of submitting an anonymous survey to Cade's former commissioners and, thus, I asked for the approval of the King's College London Law Research Ethics Subcommittee on 27 February 2017, which was granted on 8 May 2017.⁴⁴¹ However, nine days later on 17 May 2017, a massive *quid*

⁴³⁹ Lei n° 12529/2011, artigo 4.

⁴⁴⁰ See footnote 530.

⁴⁴¹ REC Reference Number: HR-16/17-2546. See the appendix, to see the questionnaire and information sheet sent to former commissioners.

pro quo corruption scandal broke out, in which the president of the republic Michel Temer and a member of his staff, contacted and arguably influenced a few of Cade's top-officers.⁴⁴² The scandal had great repercussion within the media, audio recordings of conversations between the politicians and Cade's officers were revealed, and the president of the republic Michel Temer ended up being charged with *quid pro quo* corruption.⁴⁴³ Consequently, perhaps there could be no worse time to submit a survey to former commissioners asking about political pressure. That said, even after the scandal, and even bearing in mind that the willingness to disclose information about this sensitive topic may be naturally low, one in four respondents has answered the survey — ten out of the 39 former commissioners to whom I sent it.⁴⁴⁴

The aim of the survey was not to draw any conclusive estimate of the frequency of political pressure on Cade, or make any other kind of statistical analysis; but rather just to hear reports from some of the former commissioners about their experiences while holding office, in order to qualitatively improve discussions as to how political pressure over Cade might work in practice. For this reason I have used the information provided by former commissioners only where appropriate, to ground some of the discussions in this thesis — see pages 166, 174, 175, 176, 177, 184 and 243. As the survey was designed to protect respondent anonymity because of the sensitive nature of the topic, I will identify the commissioners with numbers according to the order of their

⁴⁴² *GI/Jornal Nacional*, 'Dono da JBS grava conversa com Michel Temer, diz O Globo' (17 May 2017) <<http://g1.globo.com/jornal-nacional/noticia/2017/05/dono-da-jbs-grava-conversa-com-michel-temer-diz-o-globo.html>> accessed 16 February 2018.

⁴⁴³ The decision on the accusation is pending as of June 2018. Due to political reasons, the Congress decided to suspend the accusation until the end of Temer's term, when the case is going to be sent to a judge. See subsection 6.4.5 for a discussion of the case.

⁴⁴⁴ I have tried to contact by e-mail all former chairmen and commissioners who were appointed and approved to Cade between 1994 and July 2012. The following four former commissioners have passed away: Carlos Eduardo Vieira de Carvalho, Leonidas Rangel Xausa, Miguel Tebar Barrionuevo and Luiz Fernando Schuartz. Moreover, I could not find e-mail or other contact information of the five following former commissioners: Marcelo Monteiro Soares, Edgard Lincoln de Proença Rosa, Antonio Carlos Fonseca da Silva, Paulo Dyrceu Pinheiro and Mércio Felsky. The remaining 39 former commissioners were all contacted.

appearance in the thesis — for example, ‘anonymous former commissioner 1’, and so forth. To further protect their identity, I will also not quote their responses verbatim.

The former commissioners’ survey responses are only one of many sources that will be used throughout this chapter. In addition to the survey, it will also be consulted Pedro Dutra’s book ‘*Conversando com o CADE*’,⁴⁴⁵ and Pedro Zanotta’s ‘*Conversando com o CADE...e com a SDE*’,⁴⁴⁶ which contain interviews with former commissioners and high-ranking Cade officers; academic books and articles about the politics of competition law, such as William Kovacic’s paper ‘Competition agencies, independence, and the political process’; news articles; legislation; and court and Cade records.

Lastly, I shall clarify: when I use the term *commissioner* throughout this chapter, I am referring to all members of Cade’s board, including its chairman. Although Cade’s board is technically composed of one chairman and six commissioners, I will use the term ‘commissioner’ generically to enhance the reading of this chapter. What is relevant for this chapter is the fact that the commissioners and chairman together compose Cade’s board and, therefore, have a final say on the agency’s cases.⁴⁴⁷ Also, to improve the reading of the chapter, I will use the pronoun ‘he’ for all anonymous former commissioners, though they may be male or female.⁴⁴⁸

⁴⁴⁵ Pedro Dutra, *Conversando com o CADE* (Singular 2009).

⁴⁴⁶ Pedro Zanotta, *Conversando com o CADE...e com a SDE* (Singular 2017).

⁴⁴⁷ All members have the same voting rights but, in case of a draw, the chairman has an extra vote. Nonetheless, the chairman’s casting vote is rarely necessary.

⁴⁴⁸ Female representation within Cade’s board has followed the sad, old patriarchal *cliché*. Of the 39 former commissioners I reached, only five were women.

6.2. The impact of political finance on the democratic controls on Cade

As argued by Bill Kovacic, no strong competition agency around the globe will likely be entirely insulated from the political process.⁴⁴⁹ As he puts it,

It is difficult to imagine that a jurisdiction would give broad powers to a competition agency — for example, to gather business records, to review a wide range of business behaviour, and to impose strong sanctions — without also creating some mechanisms that press the agency to exercise its powers in ways that serve society's interests.⁴⁵⁰

Therefore, *channels of political influence*⁴⁵¹ will inevitably exist in most jurisdictions — even in the case of competition agencies created as ‘a stand-alone commission’ and if ‘its members have tenured appointments’.⁴⁵²

What are the channels of political influence within Brazilian legislation then? The first and most obvious one is lawmaking. But we have already discussed that in the previous chapter. Our main concern here is, *once the legislation is already set, could political finance impact how this legislation is enforced.*

⁴⁴⁹ William E Kovacic, 'Competition Agencies, Independence, and the Political Process' in Josef Drexler, Wolfgang Kerber and Rupprecht Podszun (eds), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar 2011) 299. For an in-depth discussion of arguments in favour and against the independence of European national competition authorities towards political interference, see chapter 3 at Christopher Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (Bloomsbury Publishing 2018).

⁴⁵⁰ Under this view, the ‘more insulated the competition agency is from the political process, the narrower will be the powers that a legislature is likely to entrust to the agency’. Kovacic, 'Competition Agencies, Independence, and the Political Process' 303.

⁴⁵¹ Kovacic calls these channels as ‘pressure points’. I will not use this term because for the purposes of this chapter I will call pressure a contact made by a politician to influence Cade's enforcement in which there is a promise or threat. See subsection 6.3.1.

⁴⁵² Kovacic, 'Competition Agencies, Independence, and the Political Process' 299.

In this perspective, there are two main channels of political influence within the Brazilian legal framework. The Presidency of the Republic and the Congress may influence the enforcement of the legislation (i) through the *appointment process*, and (ii) by setting the *budget and human resources* of the agency. In addition to these channels of political influence, I will argue that the prerogative of the Presidency of the Republic and the Congress to extend or diminish the agency's power through the approval of a bill, may be a *natural and tacit restraint* on Cade's decision-making. Consequently, elections could also impact the antitrust enforcement through this subtler channel.

It is true that elected politicians have also tried to impact antitrust enforcement through three other exotic methods: (i) President Fernando Henrique Cardoso tried to grant an antitrust immunity to the financial sector, by *approving an opinion of the attorney general of Brazil*; (ii) Cardoso's minister of justice once accepted a *hierarchical appeal* to cancel a decision of Cade; and (iii) Congress has threatened to enact a *legislative decree* to cancel a decision of Cade. But I will not focus on these instruments in this section because they were either only a threat (the legislative decree), were ineffective (hierarchical appeal), or their constitutionality and legality are subject to a quite controversial judicial discussion (the president's approval of the attorney general's opinion). In any event, those exotic instruments will be discussed in section 6.4.

6.2.1. The appointment process

To address this first channel of influence, firstly I will explain which antitrust enforcement positions politicians can appoint; and, subsequently, what roles these positions have in enforcing legislation. Next, I consider whether empirical evidence affirms that the ideology of Cade's enforcers indeed impacts the enforcement

of the legislation. I conclude by discussing whether the corruption of elections has impacted the democratic integrity of antitrust enforcement, through this channel of influence.

The appointment processes

Elected politicians are empowered to appoint and confirm three crucial positions in antitrust enforcement: (a) the Cade's general superintendent; (b) the Cade's chairman and the six commissioners, who compose the tribunal of the competition agency; and (c) the judges of the appellate and superior federal courts, who may eventually hear cases when there is a judicial review of Cade decisions.⁴⁵³

The Presidency of the Republic gets to appoint Cade's chairman, commissioners and general superintendent. And the Senate has the power to confirm the nominations.⁴⁵⁴ The chairman and the commissioners have a four years tenure, with no option of renewal (until 2012, they had a two-year tenure, which could be renewed once). And the general superintendent has a two-year term, which can be renewed once. They all may only be removed by a decision of the Senate upon request of the President of the Republic, or in view of 'an undisputable criminal conviction for intentional crimes, or disciplinary proceeding as determined by Law No 8112, of December 11th, 1990 and Law No 8429, of June 2nd, 1992', or due to a violation of prohibitions⁴⁵⁵ during the exercise of their

⁴⁵³ In Brazil, cartels are not only an administrative offence but also a crime, which is heard by the judiciary. However, in practice, the criminal enforcement of cartels through the judiciary has been much less intense than antitrust enforcement through Cade.

⁴⁵⁴ Lei nº 12529/2011, artigo 6. In the former Competition Act 1994, the appointment process was established in article 4. Lei nº 8884/1994.

⁴⁵⁵ The chairman, commissioners and the superintendent are prohibited from practicing several activities, such as receiving fees; engaging in the practice of other professional service; holding interest, as a controller, director, manager, or agent, on corporations or companies of any kind; acting as a consultant in any type of company; state, by any means of communication, an opinion on cases pending trial; and exercising political party activities. Lei nº 12529/2011, artigos 8 e 13, parágrafo 3. Lei nº 8884/1994, artigo 6.

mandate. As far as I am aware, no chairman, commissioner or superintendent has been removed since 1994, when the first de facto antitrust legislation was enacted.⁴⁵⁶

Although the antitrust officers' mandates are not coincident, each president of the republic gets to appoint and the Senate gets to confirm all the above-mentioned antitrust positions in a four-year timeframe, that is, during a legislature.

The judiciary is apparently less vulnerable to political influence. All lower court judges are nominated after tough entrance examinations largely insulated from the influence of the political bodies. The political branches have a *relative* influence on the composition of the appellate federal courts⁴⁵⁷ and the Superior Tribunal Court (STJ), which is the highest court of appeal on non-constitutional issues: The president of the republic gets to choose the nomination from a list of three candidates which is sent by the courts themselves.⁴⁵⁸ Afterwards, the Senate gets to approve the president's choice. Political influence on the composition of the Supreme Court (STF), which is the highest court of appeal for cases which discuss constitutional matters, is greater:⁴⁵⁹ the president of the republic is free to choose his nomination for the STF, which must be approved by the Senate. However, as of June 2018, STF has rarely heard cases involving Cade decisions.

⁴⁵⁶ For an account of the evolution of the Brazilian antitrust legislation, see chapter five.

⁴⁵⁷ That is, the Regional Federal Courts (TRFs) and the Tribunal of Justice of Federal District in Brasília.

⁴⁵⁸ The list is formed of the three candidates who received the most votes in the plenary of the court (all judges that sit on the court get to vote).

⁴⁵⁹ The Supreme Court also has the authority to discuss non-appeal cases, such as the direct unconstitutionality action (ADI), which is a lawsuit filed to declare that legislation is contrary to the Constitution, and regular criminal offences committed by public authorities such as the president of the republic. Nonetheless, those kinds of cases are not relevant to our analysis in this chapter.

A brief introduction to the structure of Brazilian antitrust enforcement

Before discussing whether political finance has impacted the composition of antitrust enforcers, a little background information is needed to define who are they and what are their roles.

Cade's general superintendent is the gatekeeper: he has the power to investigate and to instruct antitrust cases. If the General Superintendence issues an opinion recommending the approval without conditions of a merger and no commissioner manifests the opinion that the case should be analysed by Cade's tribunal, the general superintendent's decision will be legally considered the final decision of the agency.⁴⁶⁰

The general superintendent's power is also significant when it comes to anticompetitive conduct cases, that is, cartel and unilateral anticompetitive conduct cases. Since the deadlines to close an anticompetitive conduct case (article 46 of the Competition Act 2011) are much longer than those for mergers (article 88, item II, paragraph 2, and paragraph 9), the General Superintendence has more discretion to decide when a given anticompetitive case will make it to the competition agency's tribunal.

Until 2012, this power to investigate and to instruct cases concerning anticompetitive conduct was granted to the Secretariat of Economic Law, SDE (acronym in Portuguese for *Secretaria de Direito Econômico*) of the Ministry of Justice.⁴⁶¹ Considering that the head of the SDE did not have a tenure and, therefore, could be fired anytime by the minister of justice, many have questioned how political were SDE's decisions. For instance, Neide Mallard, former commissioner of Cade, said that she declined an invitation to become the head of the SDE because she 'knew the difficulties

⁴⁶⁰ Lei n° 12529/2011, artigo 65, inciso II.

⁴⁶¹ Lei n° 8884/1994, artigo 14.

of effectively enforcing anticompetitive practices when there is no hierarchical independence and autonomy to make decisions’.⁴⁶²

Indeed, the lack of formal decision-making autonomy has prevented SDE from investigating certain matters: for example, the Secretariat refused to investigate a case in the banking sector, claiming that, as a body of the direct public administration, it was bound by an opinion of the Attorney General Office which gave antitrust immunity to that economic sector.⁴⁶³ Ambiguously, however, the SDE did oppose the government’s opinion in a few cases.⁴⁶⁴ Although it is unclear what level of dependence SDE had from the government in practice,⁴⁶⁵ the fact that the Secretary did not have formal decision-making autonomy certainly did not enhance its insulation from political influence.

Cade’s tribunal, in turn, has the final say on all the agency’s cases — even when the General Superintendence decides to dismiss a merger or conduct case, the commissioners have the power to ask for a hearing of the case in the tribunal.⁴⁶⁶

⁴⁶² Neide Terezinha Mallard, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 41.

⁴⁶³ Processo Administrativo nº 08700.003070/2010-14. See subsection 6.4.3.

⁴⁶⁴ The case regarding the merger between Brahma and Antarctica, the two largest Brazilian brewery companies, is an example. Although Cardoso’s ministers and the head of the ruling Brazilian Social Democracy Party’s reportedly contacted the Cade’s chairman Gesner Oliveira arguing for a non-interventionist clearance of the merger (see subsection 6.4.2), SDE issued an opinion for a quite strong intervention: the merger should be cleared with the condition that the companies sell the brand and assets of Skol, Brahma or Antarctica beers, which were the three most popular Brazilian beers at the time. The SDE’s opinion was similar to the one issued by the SEAE (Secretariat for Economic Monitoring of the Ministry of Finance), who advocated for the sale of the brand and assets of Skol, which was the most popular Brazilian beer at the time. Ato de Concentração nº 08012.005846/1999-12. For reports about situations when, despite the intuitional vulnerability of the Secretary, the Minister of Justice assured the autonomy of the Secretariat in practice, see Arthur Badin, 'Entrevista' in Pedro Zanotta (ed), *Conversando com o CADE...e com a SDE*, 49; Barbara Rosenberg, 'Entrevista' in Pedro Zanotta (ed), *Conversando com o CADE...e com a SDE*, 208.

⁴⁶⁵ As noted by Kovacic, ‘a variety of informal customs, norms, and habits can either increase or decrease the amount of independence that formal organisational structures and operating procedures might indicate’. Kovacic, 'Competition Agencies, Independence, and the Political Process' 297. Moreover, the level of independence at the time might have varied according to who occupied the head of the Secretariat and according to who was the head of the Ministry of Justice.

⁴⁶⁶ Lei nº 12529/2011, artigo 65, inciso II (with respect to merger cases). Lei nº 12529/2011, artigo 67, parágrafo 1o (with respect to investigations regarding anticompetitive conducts). When an investigation is concluded with respect to anticompetitive conduct, and the General Superintendence of Cade opens a *formal administrative proceeding* but eventually decides to dismiss it, the case will be automatically sent to the analyses of Cade tribunal. Lei nº 12529/2011, artigo 13, inciso VII. Under the former Competition Act 1994, all mergers and conduct cases were automatically sent to the analyses of Cade tribunal, after the SDE issued its opinion.

Therefore, the commissioners in Cade tribunal have the power to have the final say on whether to clear a merger; and deliberate on whether to impose fines in cases involving anticompetitive practices. The competition agency's final decision is dispersed between seven commissioners (including the chairman) — at least three of them are required to deliberate on a case. This dispersal of decision-making may turn political influence more difficult, as illustrated by an audio recording revealed during the JBS scandal, in which the politician Rodrigo Loures said to businessman Joesley Batista that 'what matters there [at Cade] is the number of votes that are sufficient to be able to approve things'.⁴⁶⁷

Cade's decisions can be potentially reviewed by the judiciary, which is apparently less vulnerable to political influence, as we have just seen. Although the ratio of Cade's decisions that are changed by the judiciary is subject to debate,⁴⁶⁸ it is a fact that judges may influence antitrust enforcement.

⁴⁶⁷ Julia Affonso and Luiz Vassallo, "Aliado de Temer sugeriu a Joesley dar 'missão' para testar presidente do Cade" *O Estado de S. Paulo* (27 May 2017) <<http://politica.estadao.com.br/blogs/fausto-macedo/aliado-de-temer-sugeriu-a-joesley-dar-missao-para-testar-presidente-do-cade/>> accessed 16 February 2018.

⁴⁶⁸ For example, after analysing judicial verdicts in 2006 and 2007 on Cade decisions taken between 1999 and 2007, Caroline Viera concluded that most decisions of the agency were upheld by the judiciary. Caroline Sanselme Vieira, 'CADE X Judiciário: estudo sobre a revisão judicial das decisões do CADE no contexto da globalização' (Dissertação de Mestrado em Direito, Pontifícia Universidade Católica de São Paulo — PUC/SP 2008). By contrast, a study co-authored by Cade, the research think-tank Sociedade Brasileira de Direito Público (SBDP) and the Federação das Indústrias do Estado de São Paulo (FIESP) has found mixed results on the judiciary's verdicts about Cade's decisions that were taken between 1994 and 2000. Fabrício Antonio Cardim de Almeida (editor), *Revisão Judicial das Decisões do Conselho Administrativo de Defesa Econômica (CADE): Pesquisa empírica e aplicada sobre os casos julgados pelos Tribunais Regionais Federais (TRFs), Superior Tribunal de Justiça (STJ) e Supremo Tribunal Federal (STF)* (Fórum 2011) (as cited in Andréia Henriques, 'Para Badin, Justiça é "loteria" ao definir decisões do Cade' *DCI — Diário Comércio Indústria e Serviços* (8 November 2010) <<https://www.dci.com.br/servicos/para-badin-justica-e-loteria-ao-definir-decis-es-do-cade-1.292938>> accessed 16 February 2018).

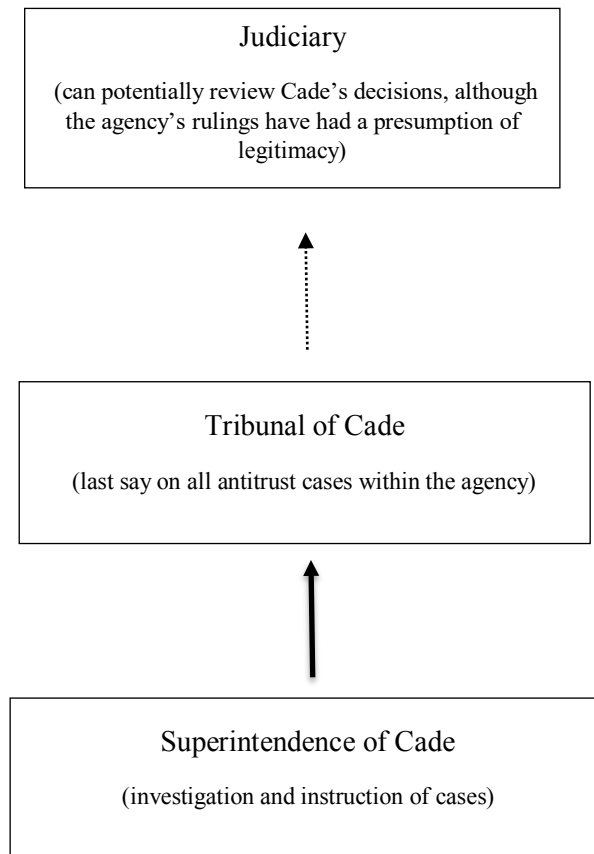


Figure 6.1. The structure of Brazilian antitrust enforcement

That said, this does not reduce Cade's importance, as firms certainly seem to have an interest in closing cases in the agency's sphere. Firstly, if a company wants to prosecute another firm for unilateral abuse of dominance, it has no option but to file a case at Cade, since this violation is exclusively established by the Competition Act, and the competition agency has exclusive authority to enforce its provisions (it had in the 1994 Act, and it has in the 2011 one). Likewise, if a merger meets the thresholds for antitrust analyses, merger firms are obligated to file a case at Cade to obtain legal clearance.

Secondly, firms might want to avoid a damaging litigation dispute in court following a Cade decision, be it in a merger, cartel or abuse of dominance case. The

competition agency's decisions are extrajudicial enforcement instruments, as established by article 93 of the Competition Act 2011. As such, according to Caroline Viera's research, the judiciary has usually ruled that a decision from Cade has a presumption of legitimacy and self-enforceability, and therefore should be reformed by the judiciary only when there is unequivocal and concrete evidence of Cade's illegality.⁴⁶⁹

Thirdly, companies might want to prevent the rise of other potential lawsuits analogous to a Cade case, such as a criminal investigation in a cartel case and/or a lawsuit concerning potential damages. Although these proceedings are formally independent of Cade's decision, they may use evidence that has emerged during the agency's investigation.

Finally, firms might want to avoid the negative media coverage that the report of a Cade's contrary investigation and/or decision usually results.

Later in this subsection, I will try to show that Cade's enforcement is indeed relevant to corporations.

The ideology of Cade's enforcers

It is fair to assume that those appointed to Cade will share the ideology of the administrations who appointed them or will at least have a similar one.⁴⁷⁰ We may say that the administration and the nominees will tend to *generally* agree on how

⁴⁶⁹ Vieira, 'CADE X Judiciário: estudo sobre a revisão judicial das decisões do CADE no contexto da globalização' 158–159.

⁴⁷⁰ I use ideology here as Steven Salop has defined it: 'the political and economic philosophy and experience that frames one's preferred enforcement policy and antitrust legal standards'. Salop, 'What Consensus? Why Ideology and Elections Still Matter to Antitrust' 603.

competition law should be enforced,⁴⁷¹ though this does not mean that the party in government will agree with *every* decision the appointee makes after he takes office.

As we have just seen, those appointments need to be confirmed by the Senate. Since 1994, no name has ever been rejected by the Senate, probably because as the executive frequently asks the opinion of senators before making an appointment, they can gauge beforehand if the name will be approved or not.⁴⁷² If the appointment has already been made and the government foresees a significant risk of the name being rejected by the Senate, the government may back down on putting the nomination for voting or may change the nomination. For instance, in 2004 the Lula administration initially reappointed commissioner Cleveland Teixeira, but then later refused to put the nomination for voting. Reportedly, this was to prevent a rejection by the Senate, since some senators were clearly dissatisfied with Teixeira and other commissioners' decision to block the acquisition of Garoto by Nestlé.⁴⁷³ Likewise, the media reported that, after talking with senators, the Temer administration cancelled the nomination of Amanda Athayde for the General Superintendence of Cade, nominating Alexandre Cordeiro in her place because he was backed by key senators that formed the government coalition.⁴⁷⁴ In any event, the executive most frequently has a majority in the Senate,

⁴⁷¹ The president of the republic and the senators can also ask potential enforcers for their views on certain antitrust cases involving particular economic sectors.

⁴⁷² The executive avoids making nominations that will likely be rejected by the Senate because rejections will be interpreted by the media and part of the public opinion as a government's defeat.

⁴⁷³ Ato de Concentração nº 08012.001697/2002-89. See Juliano Basile, 'Cade está sem quórum para julgar criação da Brasken' *Valor Econômico* (25 November 2004) <<https://www2.senado.leg.br/bdsf/bitstream/handle/id/458315/noticia.htm?sequence=1>> accessed 16 February 2018.

⁴⁷⁴ Lorena Rodrigues and Eduardo Rodrigues, 'Pressionado, Temer muda indicação para superintendência do Cade' *O Estado de S. Paulo* (12 September 2017) <<http://economia.estadao.com.br/noticias/geral,pressionado-temer-muda-indicacao-para-superintendencia-do-cade,70001987717>> accessed 16 February 2018. There are several media reports indicating that senators aim to influence the appointment of Cade's board. See, eg, *G1/Jornal Nacional*, 'Comissão do Senado aprova indicado do PMDB para a presidência do Cade' (14 June 2017) <<https://g1.globo.com/politica/noticia/comissao-do-senado-aprova-indicado-do-pmdb-para-a-presidencia-do-cade.ghtml>> accessed 16 February 2018.

which forms the government coalition.⁴⁷⁵ Thus, the ideology of the executive most often overlaps with the ideology of the Senate's majority.

Another question is whether ideology affects enforcement. To begin with, the impact of ideology on enforcement is only possible because the former Competition Act (1994) and the current one (2011) were both promulgated with provisions that have abstract terms, which have left enforcers with a *broad discretion* to interpret the legislation.

For instance, it is up to enforcers to decide whether a merger will tend to eliminate the 'competition in a substantial portion of the relevant market'; may 'create or strengthen a dominant position'; or may 'result in the domination of the relevant market of goods or services'. Enforcers should also decide whether the merger will 'increase productivity or competitiveness'; 'improve the quality of goods or services'; 'encourage efficiency and technological or economic development'; or will revert a significant part of the merger's benefits to consumers and should therefore be cleared.⁴⁷⁶

Similarly, when it comes to anticompetitive conduct cases, the Acts granted to enforcers the power to decide whether a conduct had the objective or the effect of limiting, restraining or 'in any way injure free competition or free initiative'; 'control the relevant market of goods or services'; 'arbitrarily increase profits'; or 'exercise a dominant position abusively'.⁴⁷⁷ Thus, enforcers do have broad discretion to interpret the legislation.

Nevertheless, do we have evidence that ideology impacts antitrust enforcement in practice? Brazil still lacks empirical studies on this topic, but an article from Marcio Moran and others have recently made a solid case. They statistically analysed 5,091

⁴⁷⁵ See chapter two.

⁴⁷⁶ Lei n° 12529/2011, artigo 88. The 1994 Act had equally abstract terms.

⁴⁷⁷ Lei n° 12529/11, artigo 36; Lei n° 8884/1994, artigo 20.

merger control cases scrutinised by Cade and found that, the more commissioners seated on the Cade's plenary appointed by the centre-left Workers' Party administrations, the more interventionist tended to be the decision; and, the more commissioners seated on Cade's plenary appointed by the centre-right Brazilian Social Democracy Party administrations, the less interventionist tended to be the decision.⁴⁷⁸

Another indication that ideology impacts antitrust enforcement in Brazil is big business lobbying around Cade nominations. An anonymous former commissioner has reported that large beverage (Ambev), mining (Vale) and food (Nestlé) corporations have lobbied senators against various nominations for Cade's board.⁴⁷⁹ Vale even reportedly sent a letter to the minister of justice against the nomination of Arthur Badin for the head of the agency in 2008.⁴⁸⁰ In a more recent case, the media reported audio recordings in which a senator (Ciro Nogueira⁴⁸¹) offered influence on Cade's appointment process to meat-packing businessman Joesley Batista, who was a large

⁴⁷⁸ M R Moran, A Seth and A A Fischmann, 'Does Antitrust Commission Structure Bias Merger Reviews? The case of Brazil' (Discussion paper — INSEAD, 2016). The impact of ideology on antitrust enforcement has seen some controversy among empirical studies in the United States. For instance, scholars such as Steve Salop, and Jonathan B Baker and Carl Shapiro have found statistical evidence that antitrust enforcement has varied according to the administration in office (Salop looked at the at Clinton DOJ, G W Bush DOJ and Obama DOJ; and Baker and Shapiro's conclusion are particularly with respect to the DOJ, from the Reagan administration to Obama's first term). Salop, 'What Consensus? Why Ideology and Elections Still Matter to Antitrust'. Jonathan B Baker and Carl Shapiro, 'Reinvigorating Merger Enforcement That Has Declined as a Result of Conservative Economic Analysis' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press 2008). Jonathan B Baker and Carl Shapiro, 'Evaluating Merger Enforcement During the Obama Administration' (2012) 65 Stanford Law Review Online 28.

On the other hand, Ronan Harty, Howard Shelanski and Jesse Solomon looked at the data on merger review by the FTC and DOJ across political administrations from 1981 through 2010, and found no important differences in enforcement among the administrations. Ronan P Harty, Howard Shelanski and Jesse Solomon, 'Merger Enforcement Across Political Administrations in the United States' (2012) 2 *Revue des Droits de la Concurrence*. In a similar vein, Daniel Crane looked at the G W Bush and Obama administrations and found that 'although there will be tweaks at the margin from administration to administration', most of the antitrust enforcement has seen no statistical difference between the administrations. Daniel A Crane, 'Has the Obama Justice Department Reinvigorated Antitrust Enforcement' (2012) 65 Stanford Law Review Online 13.

⁴⁷⁹ Anonymous former commissioner 1.

⁴⁸⁰ Juliano Basile, Raquel Ulhoa and Paulo de Tarso Lyra, 'Genro garante que indicação de Badin ao Cade será mantida' *Valor Econômico* (29 July 2008) <<https://www.pressreader.com/brazil/valor-econ%C3%B4mico/20080729/281659660818991>> accessed 16 February 2018.

⁴⁸¹ From the right-wing Popular Party (PP).

donor for his campaign and was concerned about Cade's composition.⁴⁸² Thus, some firms seem to believe that Cade's composition impacts antitrust enforcement.

Politicians and their parties also have revealed a belief in the impact of the officers' ideologies on antitrust enforcement. In 2008, all sixteen votes against the nomination of Arthur Badin to Cade's head came from the opposition parties Brazilian Social Democracy Party (PSDB) and the Democrats (DEM), according to senator José Agripino Maia, the leader of DEM. Senator Agripino argued that Badin was inflexible against certain companies, which would be problematic in the current mega-merger era. A more flexible person would be better suited for the job, he said.⁴⁸³ In other words, Agripino wanted a less interventionist Cade chairman.⁴⁸⁴

The ideology of Cade's enforcers is particularly important considering that the agency's decision is assumed to be right within judicial review, as we have seen.

The impact of corrupted elections on the democratic integrity of antitrust enforcement

Since elections determine who will occupy the Presidency of the Republic and the Senate; since the politicians empowered in those offices are responsible for appointing and confirming the names for key positions of the antitrust enforcement;

⁴⁸² Hugo Marques, Thiago Bronzatto and Laryssa Borges, 'Exclusivo: Em áudio, Joesley promete repassar dinheiro para Ciro Nogueira' *Revista Veja* (6 October 2017) <<https://veja.abril.com.br/politica/em-audio-joesley-promete-repassar-dinheiro-para-ciro-nogueira/>> accessed 16 February 2018. See also subsection 6.4.5.

⁴⁸³ Juliano Basile, 'Arthur Badin é aprovado para presidência do Cade' *Valor Econômico* (5 November 2008) A10.

⁴⁸⁴ Notwithstanding the votes against his nomination, Badin received the support of the majority of the Senate. The approval of his nomination by the Senate took four months and a half of deliberation and negotiation between the government and the senators. *Revista Veja*, 'Senado finalmente aprova Badin' (4 November 2008) <<https://veja.abril.com.br/blog/radar/cade-senado-finalmente-aprova-badin-2/>> accessed 16 February 2018. Perhaps Cade's composition would have been more interventionist in general, or even more interventionist than Badin was (ie, seemed to be for some corporations), in the absence of dependence and war chest corruption.

since presidents and the Senate tend to appoint and confirm those names with which they tend to share the same or a similar ideologies; and since there is evidence that the ideology of Cade's officers impact enforcement; the democratic integrity of antitrust enforcement is compromised if the elections are not 'normal and legitimate'.⁴⁸⁵

Thus, if war chest corruption apparently occurred (that is, if the amount of corporate donations is so overwhelming that it distorts the level playing field in elections), the democratic integrity of the enforcement of the competition law was apparently compromised.

There also might be a problem in the case of dependence corruption (that is, the dependence of the politician on the financial support of wealthy patrons) if top donors, such as the brewery Ambev and the mining company Vale, are granted with privileged access to the executive or to senators, to lobby in favour or against a certain nomination for Cade.⁴⁸⁶ Moreover, due to the dependence corruption, the elected politician might surrender to the corporate lobby more easily. The politician may make a pro-donor choice even in the absence of any lobbying, so to have business as a frequent donor in future elections. Similarly, there is no question about the harm on the democratic integrity of antitrust enforcement in the case of a *quid pro quo* campaign finance corruption related to a nomination for Cade, since it corrupts the politicians' attitude.

Nevertheless, we do not have evidence suggesting that corporations indeed had more access to politicians; or that those politicians who received more corporate money were indeed convinced more easily by the businessmen's lobbying or felt more

⁴⁸⁵ To use the words written in the Constitution. As I discuss in chapter seven, a 'normal' and 'legitimate' election is one where there is an appearance of integrity.

⁴⁸⁶ It should be noted the Olsonian intuition that business might already have an initial advantage due to the fact that they are in a smaller number, more organized, and with more resources to spend on lobbying, vis-à-vis consumers — see section 1.2. This intuition has been extensively explored by the Public Choice Antitrust School — see footnote 529.

dependent, impacting their decision-making; or clear evidence that corporate money corrupted the decision-making of politicians and blocked a given nomination to Cade.

6.2.2. The Cade's budget and human resources

Those forms of political finance corruption may impact not only the appointment process but also Cade's budget (which, in turn, may relate to the agency's human resources).

Both members of the executive and legislative branches are responsible for setting Cade's budget. The agency's budget is determined through annual legislation written by the executive and subsequently reviewed, amended and approved by the legislature. The Presidential Chief of Staff Office and the Ministry of Planning are responsible for initially setting the budgetary limits for each body of the federal state, including Cade. Based on this limit set by the government, Cade writes a budget proposal for the next year, and sends it back to the Ministry of Planning. The president of the republic then reviews the draft of the budget bill and sends it to Congress. Congressmen have the power to amend the bill.⁴⁸⁷

Politicians that are in favour of more antitrust intervention may support more money to Cade, and those politicians that are in favour of a less interventionist antitrust enforcement may support a tighter budget. Therefore, elections might impact antitrust enforcement also because the Presidency and the Congress are the ones who establish Cade's budget; and because the amount of resources to Cade may impact antitrust enforcement.

⁴⁸⁷ For an overview of the budget legislative process, see Câmara dos Deputados, Consultoria de Orçamento e Fiscalização Financeira, 'Entendendo o Orçamento' <<http://www2.camara.leg.br/orcamento-da-uniao/leis-orcamentarias/entenda/cartilha/cartilha.pdf>> accessed 16 February 2018.

Nevertheless, up to now, there is no empirical evidence to confirm the intuition that different parties in government may set different levels of budget and that different levels of budget cause an increase or decrease of Cade's enforcement.

6.2.3. The natural restraint

According to a model proposed by Alexandre Gheventer, Cade's officers tend to consider how their antitrust enforcement will echo on the political branches because elected politicians might 'punish' the agency if they get upset.⁴⁸⁸ Kovacic apparently embraces a similar model when he argues that,

If the agency must submit its budget estimates through an executive branch ministry, *the process gives that ministry the ability to reward or punish the competition agency for past behaviour*. If the legislature is the final gatekeeper for budget approval, *the agency must consider how legislators might take the agency's behaviour into account in deciding how to vote on the budget*.⁴⁸⁹

Along these lines, Cade's top officers may be indirectly influenced by the composition of the executive and legislature: the agency might take into account the fact that, if a certain decision will likely upset the political bodies, it may thus financially impact the Cade's budget in the next year. Therefore, according to this model, the

⁴⁸⁸ Alexandre Gheventer, *Autonomia versus Controle: Origens do novo marco regulatório antitruste na América Latina e seus efeitos sobre a democracia* (Editora UFMG 2005) 179. According to Gheventer's model, Cade's decision may displease the executive or the legislative, but it must not displease both political bodies simultaneously — otherwise, they will punish the agency.

⁴⁸⁹ Kovacic, 'Competition Agencies, Independence, and the Political Process' 301 (emphasis added).

agency might shape its decisions in accordance with the expectations of the executive and the legislative wishes. For instance, around 2016–2017 the then commissioner and interim chairman Gilvandro Araújo met with politician Rodrigo Loures, a key member of the Temer Administration, to discuss Cade’s budget (Araújo said that he wanted to prevent possible cuts).⁴⁹⁰ Under the Gheventer’s model, if Cade decided a case in a way that disappointed the Temer Administration, the agency could have been punished through cuts to next year’s budget.

Similarly, the agency’s top officers would also be tacitly restrained because Congress and the Presidency have the prerogative *to extend or diminish Cade’s power through the approval of a bill*.

Therefore, elections might impact antitrust enforcement through the natural restraints that Cade might have.

Nonetheless, it may be hard to detect this subtle effect of Cade’s officers ‘wanting to remain in the good graces’ of the political branches.⁴⁹¹ Moreover, it is questionable to what extent Cade’s officers, during antitrust enforcement, will give significance to potential rewards or punishments given by either branch.

6.2.4. Conclusion of the section

This section has argued that there are democratic controls on Cade, which might be impacted by political finance corruption. However, there is a lack of evidence to sustain that the democratic controls through budget/resources and natural restraint have really been harmed. By contrast, there is evidence suggesting that elections might indeed

⁴⁹⁰ As reported by Araújo himself. DPF (Departamento de Polícia Federal), Inquérito Policial nº 4483/DF (RE 91/2017-1), fls 476.

⁴⁹¹ As argued by Salop with respect to the Assistant Attorney General and the Federal Trade Commission. Salop, 'What Consensus? Why Ideology and Elections Still Matter to Antitrust' 637.

impact antitrust enforcement through the democratic control on Cade's composition. Therefore, if war chest corruption has apparently occurred, it is possible to argue that the democratic integrity of antitrust enforcement has apparently been harmed in this sense.

6.3. The impact of political finance on the pressure or contact made by politicians on Cade

In the last section, we saw that there will inevitably exist channels of political influence, by which politicians may influence antitrust enforcement: politicians get to choose the agency's heads and set its budget, and Cade's officers might be naturally constrained by the politicians' prerogative to curb the agency's power and resources. In all those three situations, politicians may influence antitrust enforcement *without having to contact or exert pressure on Cade's officers*.

In this section, we will look at situations in which elected politicians pressure or contact Cade's officers to try to influence the agency's decision-making, be it in general or regarding a specific case.

In Brazil, the view that antitrust enforcement should be 'independent' has gradually gained strength.⁴⁹² That said, as the degree of independence is always an open question, there is no consensus on the legitimacy of political pressure and contact. What is safe to say is that political pressure and contact have been occurring in Brazil, as it will be shown below.

I will begin this section by analysing the different ways by which a politician can approach Cade — I will argue that we must differentiate mere political 'contact' from 'pressure'. Next, I will claim that there are limitations to the two main safeguards of

⁴⁹² For a historical account of the gradual process of Cade gaining more independence, see Navarrete, 'As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962–1994)'.

Cade's independence — that is, the commissioners' tenure and the transparency of the agency. Subsequently, I will theoretically explore how political finance might impact the pressure or contact made by politicians on Cade. In the end, however, I will argue that there are questions about how effective political pressure and contact really have been.

6.3.1. The difference between pressure and contact

Before analysing how political finance might impact the pressure or contact made by politicians on Cade, we must differentiate the two types of communication which may take place when an elected politician approaches a Cade's officer.

In the complexity of everyday life, it is not always possible to draw a clear line between what is aggressive and what is not. The position that a politician occupies within the government and/or in Congress, the occasion (time and place) that the politician addresses the commissioner, the tone of the voice, the way the politician faces and looks at the commissioner and his manners, are all characteristics that may indicate a greater or lesser aggressiveness. But the interpretation of such behaviours and circumstances also depends on the personality of the listener, in this case, the commissioner. For one commissioner, a given politician's behaviour may indicate great aggressiveness. But for another commissioner, that same contact could have been completely normal. It is subjective. That is why I will propose that it is more prudent to draw a line in the following terms: when a threat or promise is not explicitly made, that is a 'contact', not a 'pressure'.

Pressure

A pressure occurs when an elected politician or a member of his team approaches a Cade officer with a promise or a threat. For instance, politicians may *promise* that they will: (1) work to provide more funding and/or human resources to Cade; (2) give political support for the approval of a competition bill or a specific provision of the competition bill that will benefit or is in the interests of the agency; and/or (3) give political support for the reappointment process⁴⁹³ or in the appointment for another public office job. And politicians may *threaten* that they will: (1) draft legislation to curb the agency's powers or even a decision; (2) work to cut Cade's funding and/or human resources; (3) work against the commissioner's reappointment or appointment for another public office job; and/or (4) open a parliamentary inquiry committee⁴⁹⁴ or produce parliamentary hearings about the case.

Some of these pressures have occurred in practice. During the agency's decision on the Nestlé-Garoto merger, commissioners were publicly threatened with the opening of a parliamentary inquiry committee; and a threat of legislative decree to cancel Cade's decision.⁴⁹⁵ In addition, an anonymous former Cade commissioner has reported that

⁴⁹³ Until 2012, when the Competition Act 1994 was in force. See subsection 6.2.1.

⁴⁹⁴ According to article 58 paragraph 3 of the Constitution, the parliamentary inquiry committees, known in Brazil as CPI (acronym in Portuguese for *Comissão Parlamentar de Inquérito*), 'shall be created by the Chamber of Deputies and by the Federal Senate, jointly or separately, upon the request of 1/3 of its members, to investigate a given fact and for a certain period of time, and their conclusions shall, if the case may be, be forwarded to the Public Prosecution to determine the civil or criminal liability of the offenders.' CPIs have the 'powers of investigation inherent to the judicial authorities, in addition to other powers set forth in the regulations of the respective Houses'. Constituição da República Federativa do Brasil de 1988. The CPI usually involves hearings, which in general 'tend to require extensive preparation within the agency and compel top leadership to devote substantial effort to preparation'. Kovacic, 'Competition Agencies, Independence, and the Political Process' 302.

⁴⁹⁵ Julianna Sofia, 'Cade diz que poderá reavaliar caso Garoto' *Folha de S. Paulo* (12 February 2004) <<http://www1.folha.uol.com.br/fsp/dinheiro/fi1202200423.htm>> accessed 16 February 2018. *O Estado de S. Paulo*, 'Presidente da Nestlé diz que terá a Garoto de volta' (11 February 2004) <<http://economia.estadao.com.br/noticias/geral,presidente-da-nestle-diz-que-tera-a-garoto-de-volta,20040211p17818>> accessed 16 February 2018. Cade's chairman at the time, João Rodas, and then commissioner Thompson Andrade attended a public hearing at the Senate about the case. Ibid.

there were cases in which commissioners were pressured by politicians through an explicit threat to make legislation to restrain the agency's powers; an explicit threat to accept a hierarchical appeal; and with explicit promises of political support for the approval of a competition bill (or a specific provision of the competition bill) that would benefit or was in the interests of the competition authority.⁴⁹⁶

Contact

By contrast, contact is when such promises or threats are not made — for example, the politician just wants to express his point of view regarding a certain antitrust case.

This differentiation between pressure and contact may be inferred from an account made by former Cade chairman João Rodas, when he said that during his four years in office (two and a half years during centre-right Cardoso's second term and one and a half during centre-left Lula's first term), he received 'several contacts from the minister of justice and other bodies of the government, but not one single pressure on Cade's decisions'.⁴⁹⁷ The former commissioner Luiz Prado also seemed to assume that there is a difference between pressure and contact when he says that 'to hear the opinion of a politician or a member of his team is a duty of the commissioner', and that this form of communication 'does not characterise pressure'.⁴⁹⁸

The anonymous reports from former commissioners corroborate the view that a contact is not necessarily a pressure. One said that *all the contacts he received from politicians were completely normal* and that *it is part of the duties of the Cade's board to*

⁴⁹⁶ Anonymous former commissioner 1.

⁴⁹⁷ João Grandino Rodas, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 136.

⁴⁹⁸ Luiz Carlos Delorme Prado, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 261.

*listen to all versions and views about the cases.*⁴⁹⁹ Another has said that *politicians pleaded for adequate antitrust solutions in all contacts.*⁵⁰⁰ Similarly, one former commissioner said that he was contacted by politicians or lobbyists in about ten cases, and only in one did he consider the contact improper.⁵⁰¹ Another anonymous former commissioner reported that most frequently contacted him to *ask information* about the progress of a given case.⁵⁰²

Therefore, a contact made by a politician may be natural: he might have a legitimate argument to make. Moreover, a contact made by a politician is often inevitable: for instance, a member of Cade's board, usually the chairman,⁵⁰³ will have to be in contact with the executive and/or Congress to discuss the agency's budget, and it is reasonable to assume that a politician might seize the opportunity to ask for information about the development of a case. And, finally, a contact made by a politician is often even salutary: it may be helpful for Cade to hear new arguments and opinions, from different perspectives.

Nonetheless, even in the situations where a threat or promise is not made, a contact made by an elected politician always has a subtle special feature: his communication with the member of Cade's board is made with tacit knowledge that he has the authority to make decisions that may improve or diminish Cade's power. In other words, even if the elected politician says nothing in relation to a promise or a threat, it

⁴⁹⁹ Anonymous former commissioner 2.

⁵⁰⁰ Anonymous former commissioner 3.

⁵⁰¹ Anonymous former commissioner 4. He claimed that the contact was improper because the politician mentioned that a parliamentary inquiry committee could be opened about the case.

⁵⁰² Anonymous former commissioner 1.

⁵⁰³ Former commissioner Luis Schuartz reported that Cade's chairman is usually the one who receives the most political contacts. Luis Fernando Schuartz, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 269. Reports from several other former commissioners have confirmed that dynamic. For instance, an anonymous former commissioner (who is not Schuartz, since he was not heard by the survey due to his passing) reported that he had a private meeting with a senator about a case, but the chairman, who was also at the meeting, was the one who was first contacted by the politician (Anonymous former commissioner 5). In this same vein, former interim chairman Gilvandro Araújo reported several contacts with Loures (a politician) in the JBS case. DPF (Departamento de Polícia Federal), Inquérito Policial nº 4483/DF (RE 91/2017-1), fls 479–480.

remains tacit the fact that he has the power to work to increase or decrease Cade's power and resources. The mere fact that the elected politician has this power may lead Cade's officers to listen more carefully to what the elected politician has to say vis-à-vis a contact made by an unelected person.

Anonymous former members of Cade's board have reported situations that illustrate this subtle special feature. One has said that a deputy contacted him and initially brought legal arguments about a case. However, realising that his arguments did not convince the Cade officer, the congressman used his position to voice non-technical arguments, but without making explicit threats or promises. That said, to the former commissioner, the congressman's behaviour during the meeting left an impression of a certain abuse of power.⁵⁰⁴

Another anonymous former commissioner has reported that, although the deputy (who was also a minister of the Presidency of the Republic at the time) did not make promises to him or threaten him, he felt that this would have happened had they disagreed.⁵⁰⁵ Coincidentally, the politician and the commissioner shared the same view about the case, but the antitrust officer felt that there would have been consequences had they disagreed.

In addition, contact by elected politician might also be considered special because of its potential symbolic value: the elected politician represents at least part of the population. The population has elected him to participate in the parliament or lead the executive body of the state. Although one could argue that they were not elected to influence Cade's decision-making, the agency's officers may interpret that the opinion of the elected politician has a democratic feature — that is, his opinion on a particular case might represent, in theory, the opinion of a portion of the population.

⁵⁰⁴ Anonymous former commissioner 6.

⁵⁰⁵ Anonymous former commissioner 7.

Therefore, because of the tacit power of the elected politician to increase or decrease Cade's power and/or because of its symbolic democratic feature, a contact by an elected politician is a *special* one, and this may subtly influence Cade's antitrust enforcement.

6.3.2. The limitations of Cade's transparency and of the reappointment ban

Several former commissioners have argued that their tenure⁵⁰⁶ and Cade's transparency⁵⁰⁷ enhance the agency's autonomy from political pressures and contacts. I do not dispute that. Indeed, those features are crucial to Cade's independence.

But few words must be said about the limitations of Cade's transparency and the vulnerability that some commissioners might face even after the Competition Act 2011 removed the provision which enabled their reappointment.

Transparency

Cade has a reputation for being a transparent agency, especially vis-à-vis other Brazilian agencies, such as the ones designed to exclusively regulate certain economic sectors (for example, the telecommunications sector). Cade's trial sessions are open to the public and audio recordings of trial sessions are available online alongside written

⁵⁰⁶ See, eg, Cleveland Teixeira, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 217. Luis Rigato Vasconcellos, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 240. Roberto Pfeiffer, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 178. Ricardo Cueva, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 250; Elizabeth M M Q Farina, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 230.

⁵⁰⁷ See, eg, Arthur Barrionuevo Filho, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 91. Thompson Almeida Andrade, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 167. Farina, 'Entrevista' 230.

decisions. In addition, the diary of Cade's high-ranking officers is posted online. Those transparency features unquestionably help to avoid political pressure.

However, Cade's transparency does have limitations. The Access to Public Information Act 2011 enables Cade's chairman to keep sensitive information (for instance, a sensitive meeting with a politician) confidential for a period of 15 years; and enables commissioners to keep sensitive information confidential for a period of five years.⁵⁰⁸

As the Public Information Act came into force only in 2012, at the time of writing (that is, June 2018) we still do not have much information about the extent to which Cade's top officers have used them. But, according to the media, in 2013 Cade issued an official note stating that, if the disclosure of a meeting might 'harm an ongoing investigation', the occurrence of that meeting will not be disclosed.⁵⁰⁹

Moreover, meetings may be informal and out of office, such as a coffee between friends. For instance, the media reported that, in 2013, Cade's chairman Vinícius Carvalho met with Gilberto Carvalho, then a key minister of the Rousseff administration, at a café.⁵¹⁰ Yet, the meeting, which occurred on 7 October 2013 according to the media, was not published by Vinícius Carvalho on Cade's website.⁵¹¹

⁵⁰⁸ Artigo 24, parágrafo 1, incisos II e III, e artigo 27, incisos II e III, da Lei nº 12527, de 18 de novembro de 2011, DOU 18/11/2011. According to article 23 of the legislation, the security of the society or of the state is indispensable, and therefore, it should be kept as confidential the information if its disclosure may: risk an ongoing investigation or inspection, related to the prevention or repression of infractions; offer high risk to the country's financial, economic or monetary stability; or jeopardize the security of institutions.

⁵⁰⁹ *Revista Veja*, 'Registros comprovam reuniões entre presidente do Cade e petista' (5 November 2013) <<https://veja.abril.com.br/brasil/registros-comprovam-reunioes-entre-presidente-do-cade-e-petista/>> accessed 16 February 2018.

⁵¹⁰ *Revista Veja*, 'Conselho amigo' (12 October 2013) <<https://veja.abril.com.br/blog/radar/conselho-amigo-2/>> accessed 16 February 2018.

⁵¹¹ Cade (Conselho Administrativo de Defesa Econômica), 'Agenda 2013, Presidente Vinícius Marques de Carvalho' <<http://www.cade.gov.br/aceso-a-informacao/institucional/agendas/agendas-arquivos-pdf/2013/agenda-presidente-vinicius-marques-2013.pdf>> accessed 16 February 2018. Mr Carvalho was being criticised by the opposition and part of the media for arguably been implementing a partisan antitrust enforcement. For the opposition (particularly the Brazilian Social Democratic

This is not to say that Vinícius Carvalho acted wrongly, but simply to show that there might be limits to Cade's transparency.

The removal of the reappointment option

Until 2012, Brazilian legislation allowed reappointment for another term, which could be a form of pressure: the politician could promise the commissioner political support for their reappointment or could threaten to work against it.⁵¹² Moreover, the possibility of reappointment could have a subtler effect: even without any explicit pressure, it could foster in the commissioner a desire to please the Presidency (who appoints) and the Senate (who approves), tempting him to alter his behaviour towards a certain case.⁵¹³

The new Competition Act 2011 removed the option of reappointment for commissioners and extended their tenure from two to four years. As noted by former commissioner Lúcia Helena Salgado, the removal of the reappointment option helps 'to prevent any feeling of pressure from the commissioner who wanted to be reappointed, to accommodate, to relativise his positions on a case that is in the interest of the

Party) and the part of the media, Vinícius Carvalho has omitted from his resume (submitted to the Senate for the confirmation of his nomination) the fact that he was a member of the Workers' Party and that he worked as the chief of cabinet for Simão Pedro, the politician member of the Workers' Party who made the complaint about a cartel scheme that arguably involved the Brazilian Social Democratic Party in São Paulo. Some blamed Vinícius Carvalho for being responsible for leaking confidential documents about the investigation to the press. See Andreza Matais and Fábio Fabrini, 'Chefe do Cade omite ligação com denunciante de cartel dos trens' *O Estado de S. Paulo* (25 September 2013) <<http://politica.estadao.com.br/noticias/eleicoes,chefe-do-cade-omite-ligacao-com-denunciante-de-cartel-dos-trens-imp-,1078513>> accessed 16 February 2018. Bruno Ribeiro, 'Governo de SP acusa Cade de vazamento e compara órgão a 'polícia política'' *O Estado de S. Paulo* (2 August 2013) <<http://sao-paulo.estadao.com.br/noticias/geral,governo-de-sp-acusa-cade-de-vazamento-e-compara-orgao-a-policia-politica,1059926>> accessed 16 February 2018. Carolina Gonçalves, 'Deputados querem que Gilberto Carvalho esclareça conduta do presidente do Cade' *Agência Brasil* (11 December 2013) <<http://www.ebc.com.br/noticias/politica/2013/12/deputados-querem-que-gilberto-carvalho-esclareca-conduta-do-presidente-do>> accessed 16 February 2018.

⁵¹² Under the Competition Act 1994, the commissioner had a mandate of two years, which could be renewed once. Lei n° 8884/1994, artigo 4, parágrafo 1.

⁵¹³ Kovacic, 'Competition Agencies, Independence, and the Political Process' 300.

government or parts of the government’.⁵¹⁴ Or, as former commissioner Renault de Castro has put it, the removal helps to minimise ‘the risk of the commissioner who wants to be reappointed to relativise his or her understanding in any case that is in the interest of the political power [that is, elected politicians]’.⁵¹⁵

However, it should be noted that the general superintendent, a central figure in the antitrust enforcement system (as he is the gatekeeper), still has a two-year term, which can be renewed once. Therefore, under the same rationale, the general superintendent’s reappointment option increases his vulnerability to political pressure or contact.

In addition, although the Competition Act 2011 forbids reappointment for the same position, it does not forbid appointment to other positions within Cade’s structure. For instance, a Cade commissioner who wants to be appointed as the agency’s superintendent will still face the risk of becoming vulnerable to succumb to political pressure or contact. Commissioner and interim chairman Gilvandro Araújo apparently faced this risk when he was contacted by politician Loures, from the Temer Administration, to discuss his permanent nomination for the position of Cade head; and later received from Loures a request regarding JBS’ antitrust case.⁵¹⁶ Although as of June 2018 there is no evidence of any form of illegality involving Araújo,⁵¹⁷ my point is that this could potentially be a vulnerable situation for some officers.

The JBS case also shows that certain officers of Cade might have frequent contact with members of the executive to discuss, for example, potential nominees to the agency’s top positions. Araújo, as interim chairman of Cade, and Eduardo Frade, as the

⁵¹⁴ Lúcia Helena Salgado, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 65.

⁵¹⁵ Renault de Freitas Castro, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 74.

⁵¹⁶ DPF (Departamento de Polícia Federal), Inquérito Policial nº 4483/DF (RE 91/2017-1), fls 475–477. For a description of the case, see subsection 6.4.5.

⁵¹⁷ Procuradoria-Geral da República, Inquérito Policial nº 4483/DF (RE 91/2017-1), pg 19. The practice is under investigation — see pages 62–63 of the document.

agency's superintendent, had several contacts with Rodrigo Loures to discuss the applicants for Cade's top positions.⁵¹⁸ In this context, if a Cade officer wants to have influence on the future composition of the agency, there is a risk that he will be in a vulnerable situation if the politician has a request about a given antitrust case. I am not claiming that Araújo and Frade felt vulnerable — merely that a given officer could potentially feel vulnerable in this situation.

Therefore, even after the Competition Act 2011 removed the provision that enabled commissioners' reappointment, they may still face vulnerable situations because the legislation enables the appointment of commissioners to other positions within the agency. Equally worryingly, the Competition Act still enables the reappointment of the general superintendent. Finally, a high-ranking Cade officer might also feel vulnerable if he has frequent contact with politicians to discuss the agency's structure.

6.3.3. How political finance might impact the pressure or contact made by politicians on Cade

There are at least three reasons why political finance might impact political pressure on or contact with Cade.

Firstly, because elections determine who will occupy political offices. Different electoral winners may have different *views on whether to approach Cade or not* and, if they approach, *the content of their arguments* might also differ. For instance, say a given presidential election was impacted by war chest corruption; and that this furthered the victory of a pro-business candidate who is sceptical of antitrust laws. It is likely that if

⁵¹⁸ DPF (Departamento de Polícia Federal), Inquérito Policial n° 4483/DF (RE 91/2017-1), fls 479–480.

he decides to pressure or contact Cade about a given case, he will argue that Cade should adopt a non-interventionist approach.

From this perspective, the fact that some politicians might be more sceptical about the importance of Cade's independence than others may influence the selection of Cade's officers. As they have the power to select Cade's top officers, the Presidency and the Senate may select those people that will be more willing to hear what politicians have to say. In other words, the executive and the Senate have an opportunity to choose those individuals who are likely to be open to political contact; and to 'filter out candidates who seem certain to ignore' it.⁵¹⁹ In Brazil, this may be illustrated by the JBS scandal, when the politician Rodrigo Loures said to businessman Batista that the government should give a 'mission' to Cade's interim chairman, Gilvandro Araújo (who was appointed by the previous administration), to see if he 'responds well'. If Araújo responded well, Loures argued, the government should then appoint him as Cade's permanent chairman.⁵²⁰ In other words, Loures apparently said that the government should test the interim chairman to see if he would be receptive to government contact.

Secondly, political finance might impact political pressure on or contact with Cade if the donation gives the donor *privileged access* to the elected politician. After being lobbied by the donor, the politician may pressure or contact the agency because he was convinced ideologically by the argument (that is, convinced that the argument has merit). Thus, the competitive advantage of big donors in lobbying may impact political pressure on or contact with Cade.

⁵¹⁹ Kovacic, 'Competition Agencies, Independence, and the Political Process' 299–300. Even if a politician gets to appoint an antitrust officer, there are antitrust issues that might arise after the appointment, which can potentially cause disagreement between them. Moreover, politicians may sometimes change their mind about what they want.

⁵²⁰ Julia Affonso and Luiz Vassallo, "Aliado de Temer sugeriu a Joesley dar 'missão' para testar presidente do Cade".

Or, thirdly, the elected politician might surrender to the corporate lobby or perhaps *simply approach Cade absent any lobbying*, because he wants to have the business as a frequent donor in future elections. Borrowing from the rent-seeking model described by Kovacic in relation to the FTC (Federal Trade Commission),⁵²¹ we may speculate that politicians might pressure or contact Cade in exchange for campaign finance contributions — in Brazil, the JBS scandal shows that influence on Cade's enforcement may generate resources for politicians, as will be seen in the subsection 6.4.5.

6.3.4. The uncertain relevance of political pressure or contact on Cade

The frequency of political contact with or pressure on Cade remains unknown.⁵²² In any event, even if we assume that political contact or pressure on Cade are rare,⁵²³ there is still reason to worry. If political contact or pressure are rare, those corporations that may benefit from them will have greater advantages over their competitors. For instance, if the political pressure or contact occurs only in a few cases involving large companies, it may be disturbing if this leads to a more favourable antitrust enforcement for them. Under these lines, antitrust enforcement would somewhat serve, in the end, as a competitive advantage for large companies.

⁵²¹ Kovacic, 'Competition Agencies, Independence, and the Political Process' 294.

⁵²² According to some reports, political pressure on or contact with Cade can be quite rare — for example, two former commissioners said that they were never contacted by politicians (anonymous former commissioners 8 and 9). By contrast, another former commissioner reported that he was contacted by politicians or lobbyists in around 200 different cases (anonymous former commissioner 10). Commissioners can have sat on Cade's board from a period of two years (eg, those commissioners that served Cade for just one term before the introduction of the Competition Act 2011) to around seven years (for example, Vinícius de Carvalho, who worked three years as a commissioner and then four years as Cade's chairman).

⁵²³ Perhaps political contact is rarer because the antitrust officers were filtered during the appointment process to reflect the politicians' preferences.

Nonetheless, it is also unknown how *effective* political pressure and contact really are. It is one thing to say that commissioners were pressured or contacted by politicians. It is another thing to say that commissioners *have succumbed to such pressure or contact*. Even if a commissioner believes that a given enforcement of an antitrust case would lead to negative political consequences,⁵²⁴ it is still questionable whether the commissioner would give these factors much significance in his decision making.⁵²⁵

It is also hard to tell when a commissioner has taken this pressure or contact into consideration. It is extremely unlikely that a commissioner who succumbs to such pressure or contact will admit it publicly. As argued by Salop while discussing the antitrust enforcement in the US, a commissioner who succumbs to pressure or contact will probably ‘have a strong incentive to keep it secret to avoid being tarred as someone who can be controlled’.⁵²⁶

The questionnaire I have sent to former commissioners is no exception: the willingness to disclose self-surrender was low. Even though I designed the questionnaire to protect respondent anonymity and the confidentiality of the responses, I informed all respondents that no method can guarantee 100% anonymisation and confidentiality and therefore the absolute absence of risks in this sense.⁵²⁷ Thus, the survey I sent to former commissioners surely had the limitation of not overcoming the low willingness to disclose self-surrender to political pressures.

⁵²⁴ For example, a significant impact on the agency’s budget.

⁵²⁵ Lawrence Frankel makes this argument in relation to merger enforcement in the United States. Lawrence M Frankel, 'Flawed Institutional Design of US Merger Review: Stacking the Deck against Enforcement, The' (2008) *Utah Law Review* 159 185–186.

⁵²⁶ Salop, 'What Consensus? Why Ideology and Elections Still Matter to Antitrust' 637.

⁵²⁷ I informed the respondents that all methods (online survey, physical mail or reunite all former commissioners in a room to respondent the questionnaire) have their weaknesses. I opted to use an online platform designed for academic research, which adopts safeguards to protect the anonymity and confidentiality of the responses.

Due to the low willingness to disclose, Salop speculates that the ‘incidence of successful political pressure may be understated’.⁵²⁸

In addition, it is equally hard to detect the subtle effect of pressure or contact on those Cade officers who, although they do not want to succumb consciously or explicitly, end up implicitly affected by it.

Therefore, it is difficult for a legal scholar to estimate how effective political pressure on and contact with antitrust enforcement truly has been. Perhaps an economist, a political scientist or investigative journalist might have better instruments to detect the responses by the competition authorities to such political pressures or contacts.⁵²⁹ At

⁵²⁸ Salop, 'What Consensus? Why Ideology and Elections Still Matter to Antitrust' 637.

⁵²⁹ Ibid. Public choice scholars have researched the impact of these political pressure or contact on the American antitrust authorities, through statistical studies. For instance, Roger Faith, Donald Leavens and Robert Tollison applied statistical tests to examine case bringing activity of the FTC from 1961 to 1969 and from 1970 to 1979, and concluded that the agency favoured those companies located in the jurisdictions of the politicians that had a seat on key congressional committees (ie, the ones responsible for overseeing the FTC's activity or controlling its budget). Those politicians with a seat in such committees would ‘pressure’ FTC's officers to drop the cases that could impact their voters or contributors. Roger L Faith, Donald R Leavens and Robert D Tollison, 'Antitrust Pork Barrel' (1982) 25 *Journal of Law and Economics* 329. In a similar vein, Malcolm Coate, Richard Higgins and Fred McChesney have applied statistical tests on the FTC decisions concerning mergers between 1982 and 1986, and have argued that congressmen's ‘pressures’ have impacted the agency's enforcement — greater political ‘pressure’ by members of the Congress did cause the FTC to challenge more mergers. Malcolm B Coate, Richard S Higgins and Fred S McChesney, 'Bureaucracy and Politics in FTC Merger Challenges' (1990) 33 *Journal of Law and Economics* 463. More recently, Mihir Mehta, Suraj Srinivasan and Wanli Zhao have researched mergers reviews by the FTC and the DOJ (Department of Justice) between 1998 and 2010 and argued that the firms in the constituencies of US politicians who had a seat at the congressional judiciary committees have received favourable outcomes. For the authors, their tests suggest that politician incentives to influence merger control enforcement apparently was driven by lobbying, campaign finance, and prior business connections. The authors ‘cannot observe if the outcomes are the result of explicit effort by congressional members to influence antitrust regulators or because of actions by antitrust regulators who anticipate politician preferences but are not explicitly influenced by congressional members’. Mihir N Mehta, Suraj Srinivasan and Wanli Zhao, *Political Influence and Merger Antitrust Reviews* (2017). For a discussion on the natural restraint that a competition agency might have, see subsection 6.2.3.

The public choice approach has been criticized for making the assumption that elected politicians and antitrust officers basically behave based on self-interest, without pursuing the public interest. For a description of the public choice's assumption, see Louis De Alessi, 'The Public Choice Model of Antitrust Enforcement' in F S McChesney and W F Shughart (eds), *The Causes and Consequences of Antitrust: The Public Choice Perspective* (University of Chicago Press 1995) 190. For a critic of that assumption, see, eg, Albert A Foer, 'The Politics of Antitrust in the United States: Public Choice and Public Choices' (2000) 62 *University of Pittsburgh Law Review* 475; as well as Robert A Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (MIT Press 1980). Similarly, public choice scholarship has been criticized for ignoring the fact that members of competition agencies might have incentives to not succumb to political pressure. See, eg, Russell Pittman, 'The Causes and Consequences of Antitrust' (1997) 12 *Review of Industrial Organization*

least at the time of writing, there is not enough evidence to affirm whether political pressure on or contact with Cade has indeed been effective.

6.4. The efforts of politicians to influence antitrust enforcement concerning big donors

In the last two sections, I have discussed how political finance might have impacted Cade's enforcement through (i) channels of political influence, and (ii) through the action of politicians in approaching the agency to make contact or pressure it.

But, considering that a few large corporate donors have dominated electoral donations in Brazilian federal elections,⁵³⁰ it may be proper to have a closer look at how politicians have attempted to influence the antitrust enforcement concerning those large donors.

As the attempt to influence antitrust enforcement frequently involves not only a single company, but also a whole sector, I will focus on these sectors. The top five donors in the 2014 federal elections⁵³¹ were the following sectors: (i) construction,

447. In this sense, Pittman published an empirical research where he attempted to enhance the precision of the statistical conclusions about antitrust enforcement. Since 'it is difficult to isolate direct evidence of the factors determining enforcement decision', Pittman argued that he would look at the indirect evidence, such as the evidence on firms' *belief* on influencing antitrust enforcement through campaign finance. And, after applying regression equations, he found ambiguous results. Russell Pittman, 'Antitrust and the Political Process' in David B Audretsch and John J Siegfried (eds), *Empirical Studies in Industrial Organization: Essays in Honor of Leonard W Weiss / edited by* (Kluwer Academic Publishers 1992).

Recent empirical scholarship has indeed recognized that, apart from self-interest, elected and non-elected public officials might also be motivated by other factors, such as public interest. See, eg, Marcio Roberto Moran, 'Determinants of Merger Review Decisions: An Assessment of the Brazilian Antitrust Authority's Capabilities and the Influential Role of Antitrust Commissioners' (PhD Thesis in Business, Universidade de São Paulo 2015) 123.

⁵³⁰ Mancuso, 'Investimento Eleitoral no Brasil: Balanço da Literatura (2001–2012) e Agenda de Pesquisa' 177. On average only 0.4% of Brazilian companies used to make donations. Carazza, 'Interesses Econômicos, Representação Política e Produção Legislativa no Brasil sob a Ótica do Financiamento de Campanhas Eleitorais' 49. In the 2010 general elections, only 191 companies (1% of the donors) accounted for 61% of the total amount donated. Rel Min Luiz Fux, STF, ADI 4650/DF, Inteiro Teor do Acórdão 50.

⁵³¹ That is, the elections for the Presidency, the Federal Senate and the Federal Chamber of Deputies.

engineering and urban infrastructure; (ii) agribusiness; (iii) finance, insurance, and consortia; (iv) beverages; and (v) mineral extraction, steel, metallurgy and metal products.⁵³² Apparently, those sectors have been top donors for a fairly long time. For instance, corporations from the banking, construction, steelwork, beverage and agribusiness sectors were the top funders of Lula's presidential campaign in 2006.⁵³³ There is evidence suggesting that those sectors have been large donors at least since 1994.⁵³⁴

This section will show that, in cases involving four of the top five donor sectors, politicians have made efforts to influence antitrust enforcement by granting an antitrust immunity, cancelling Cade's decision or contacting/pressuring the agency. This does not mean that there was causation between donations and a given politician's attempts to influence antitrust enforcement: there is a chance that the politician behaved in such a way not because of campaign finance but because of his view of the public interest,⁵³⁵ or to enhance his popularity (since some antitrust cases are significantly covered by the media). I also am not arguing that the attempts to influence Cade's enforcement have only occurred in cases involving these top donors: the acquisition of Garoto by Nestlé, one of the most controversial cases in the agency's history, shows that other economic sectors have experienced this phenomenon.⁵³⁶

⁵³² Getulio Vargas Foundation, Department of Public Policy Analysis (FGV/DAPP), 'Mosaico Eleitoral' <<http://dapp.fgv.br/transparencia-politica/mosaico/>> accessed 16 February 2018.

⁵³³ Silvio Navarro and Fábio Zanini 'Setor bancário deu maior doação à campanha de Lula' *Folha de S. Paulo* (29 November 2006) <<http://www1.folha.uol.com.br/folha/brasil/ult96u87203.shtml>> accessed 16 February 2018.

⁵³⁴ For campaign finance data and analysis on the 1994 and 1998 federal elections — see Samuels, 'Money, Elections, and Democracy in Brazil' 36.

⁵³⁵ Although Carazza has argued that economic sectors such as construction and financial activities have accounted for a larger share of political donations vis-à-vis their share of the Gross Domestic Product (GDP), these sectors nonetheless account for a large share of the GDP and, as such, are very important to the Brazilian economy. Carazza, 'Interesses Econômicos, Representação Política e Produção Legislativa no Brasil sob a Ótica do Financiamento de Campanhas Eleitorais' 53.

⁵³⁶ Contrary to other competition authorities, such as the British Competition and Markets Authority (CMA), Cade does not list priority sectors that it will focus on in its annual plan.

What I will hopefully show is that the top five donor economic sectors seem to have had a concern with antitrust enforcement. As will be seen, in two of these sectors (construction and financial services) the concern was dispersed among the key players, as the cases relate to cartel practices and an attempt for antitrust immunity; while in the other three sectors the concern was concentrated on the leading company, with cases relating to mergers and unilateral abuse of dominance.

6.4.1. Mineral Extraction, Steel, Metallurgy and Metal Products

After the enactment of the Competition Act 1994, which gave birth to the first effective antitrust agency in Brazil, the acquisition of the steelwork Pains by Gerdau was perhaps Cade's first controversial case.⁵³⁷

Gerdau, a Brazilian worldwide provider of steel-related products, was one of the largest donors to Cardoso's successful presidential campaign in 1994.⁵³⁸

In 1995, Cade vetoed the deal and ordered Gerdau to discontinue the acquisition of Pains because it would lead to a high concentration in the flat-steel market. Although the Competition Act established that Cade's decisions could not be reviewed in the administrative sphere (that is, by any other organ of the executive branch), Gerdau filed a hierarchical appeal to Cardoso's minister of justice, Nelson Jobim, who surprisingly accepted it and suspended the competition agency's decision.⁵³⁹ Subsequently, however, Cade sent a letter to the Ministry of Justice saying that the agency did not recognise the minister's competence to review its decisions and, as consequence, it would forward the

⁵³⁷ Ato de Concentração n° 16/1994.

⁵³⁸ *Folha de S. Paulo*, 'Área de siderurgia ajuda a eleger 20' (8 October 1995) <http://www1.folha.uol.com.br/fsp/1995/10/08/caderno_especial/15.html> accessed 16 February 2018.

⁵³⁹ Alexandre Gheventer, 'A Dimensão Política da Regulação Antitruste' (2004) 18 Boletim Latino-Americano de Concorrência 26.

case's docket to the Public Prosecutor's Office in order to execute the decision, instead of to the Ministry of Justice, as requested.⁵⁴⁰ In 1996, Cade's plenary had a new composition (that is, new commissioners), and they made an agreement with the Gerdau Group. Gerdau could buy Pains, but under two conditions: they would have to sell the transportation company Transpains, and drop the hierarchical appeal against the agency.⁵⁴¹

The crisis between Cade and the Ministry of Justice reportedly led to the formation of an inter-ministerial group during the Cardoso administration composed of members of the Ministries of Planning, Finance, Justice, and Industry and Commerce, whose purpose was to study changes in the legislation to reduce the powers of Cade, in particular in relation to mergers, which would be transferred to the Secretariat of Economic Law of the Ministry of Justice and to the president of the republic himself. According to the press, the Cardoso administration was displeased with the excessive interventionism of Cade.⁵⁴² The media reported that the government even outlined a provisional measure (that is, temporary legislation that the president of the republic can enact without congressional approval) on the subject, although it was never issued.⁵⁴³

Nevertheless, there were also reported reactions against the minister of justice (Nelson Jobim)'s attempt to cancel Cade's decision. Miguel Rosseto, a Workers' Party deputy, reportedly petitioned the Brazilian Federal Prosecution Office noting that Gerdau was the main donor to the 1994 campaign for governor of Antonio Britto, who

⁵⁴⁰ Mallard, 'Entrevista' 47.

⁵⁴¹ Gheventer, 'A Dimensão Política da Regulação Antitruste' 26.

⁵⁴² Ibid.

⁵⁴³ Fernando Rodrigues 'FHC quer superpoder com lei antitruste' *Folha de S. Paulo* (5 March 1996) <<http://www1.folha.uol.com.br/fsp/1996/3/05/dinheiro/9.html>> accessed 16 February 2018. For a discussion about the government's reaction with respect to the provisional measure, see Bello, *Autonomia Frustrada: O CADE e o Poder Econômico*, 149.

was Jobim's friend and colleague at the Brazilian Democratic Movement Party in Rio Grande do Sul state.⁵⁴⁴

6.4.2. Beverages

After the Gerdau-Pains case, Cade faced another big challenge in 2000: the merger between Brahma and Antarctica, which gave birth to the Brazilian multinational Ambev.⁵⁴⁵ The merger had the political support of Brazil's then president, Fernando Henrique Cardoso, who thought Brazil should have a multinational beverage company. As he reportedly said to the press before Cade's decision:

Brazilian companies will have to restructure. See what is happening today with Brahma and Antarctica. ... But the world today works in terms of oligopoly. Coca-Cola, what is it? How are they going to compete later with Coca-Cola, if they are not strong here? The market is internationalized, so you must look at whether there are competitors in the market or not, for which there is Cade, to prevent this (monopoly) from occurring, I do not want to anticipate whether this is going to be legal or not, let's discuss it, I'm telling you what the global trend is, the mega-mergers. I mean, we will need Brazilian multinationals.⁵⁴⁶

According to former commissioner Ruy Santacruz, ministers of the Cardoso administration and the leader of Cardoso's Brazilian Social Democracy Party have made

⁵⁴⁴ Bello, *Autonomia Frustrada: O CADE e o Poder Econômico*, 146.

⁵⁴⁵ Ato de Concentração nº 08012005846/1999-12.

⁵⁴⁶ *Jornal do Brasil* (5 July 1999) (as cited in Gheventer, 'A Dimensão Política da Regulação Antitruste' 27–28).

calls to the head of Cade at the time, Gesner de Oliveira.⁵⁴⁷ For some, Cade's decision on the merger was considered 'weak' because it did not impose strong conditions for its clearance.⁵⁴⁸ Santacruz thinks that Cade's decision on the Ambev merger left the feeling that it is always possible to approve a large merger when there is political and media pressure.⁵⁴⁹

This was not the first antitrust case involving Brahma in which the Cardoso administration had contacted Cade, since this had reportedly already occurred in 1997. Although former commissioner Renault de Freitas Castro did not report any explicit threat or promise, he felt pressured by the government and by politicians because he was ordering severe conditions for the clearance of the Brahma-Miller joint venture.⁵⁵⁰ We may dispute if those were indeed pressures, since apparently there was no explicit threat or promise. But it is less disputable the aggressiveness of one of the contacts: on the weekend before the trial that would re-examine the case, a minister of the Cardoso Administration called Castro's residence to ask for 'a special treatment' for the joint-venture (and the commissioner replied that he would give the same treatment that he gives to all cases).⁵⁵¹

After Cardoso left the government, Ambev was one of the companies that financed his think tank, the Fernando Henrique Cardoso Foundation.⁵⁵² Moreover,

⁵⁴⁷ Ruy Santacruz, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 103.

⁵⁴⁸ See, eg, Salgado, 'Entrevista' 61–62, who did not vote in the decision.

⁵⁴⁹ Santacruz, 'Entrevista' 104.

⁵⁵⁰ Ato de Concentração n° 58/1995. Castro, 'Entrevista' 71.

⁵⁵¹ Ibid 71.

⁵⁵² Daniel Bramatti 'Estatat doou R\$ 500 mil a instituto de FHC' *Terra magazine* (17 January 2007) <<http://terramagazine.terra.com.br/interna/0,,OI1352138-EI6578,00.html>> accessed 16 February 2018.

Ambev has been thereafter a top donor in Brazilian federal elections,⁵⁵³ donating to the main parties, including Cardoso's Brazilian Social Democratic Party.⁵⁵⁴

6.4.3. Financial, Insurance and Consortia

In 2001, antitrust enforcement in the financial sector came into focus. Reportedly triggered by the Central Bank (which was, in turn, allegedly influenced by commercial banks),⁵⁵⁵ the Brazilian attorney general, as head of the AGU (acronym in Portuguese for *Advocacia-Geral da União*) published an opinion stating that the Central Bank has exclusive authority to regulate competition in the financial sector.⁵⁵⁶ Subsequently, the president of the republic Fernando Henrique Cardoso approved the AGU's opinion and gave it binding legal force, benefiting the financial sector, which was the top donor to his 1994 and 1998 electoral campaigns for president.⁵⁵⁷ Among Cardoso's top donors, were the three leading banks (Itaú, Real/ABN-Amro, and Bradesco).

⁵⁵³ See, eg, using official data from Superior Electoral Court (TSE), Mariângela Gallucci, 'Campanha de Marina declara R\$ 24 mi em doações' *O Estado de S. Paulo* (1 November 2010) <<http://politica.estadao.com.br/noticias/geral,campanha-de-marina-declara-r-24-mi-em-doacoes,633369>> accessed 16 February 2018. José Roberto de Toledo, Lucas de Abreu Maia and Rodrigo Burgarelli, 'Campanha de Marina declara R\$ 24 mi em doações' *O Estado de S. Paulo* (8 November 2014) <<http://politica.estadao.com.br/noticias/geral,as-10-empresas-que-mais-doaram-em-2014-ajudam-a-eleger-70-da-camara,1589802>> accessed 16 February 2018.

⁵⁵⁴ Transparência Brasil, 'Às Claras — Quem financia quem nas eleições'.

⁵⁵⁵ Celso Campilongo, 'Entrevista' in Pedro Dutra (ed), *Conversando com o CADE*, 153. For Cláudio Monteiro Considera and Paulo Corrêa, the banking industry 'was particularly interested in keeping competition policy under Central Bank responsibility' at that moment because Febraban (the association of banks) was being 'prosecuted by SDE for fixing the interest rate'. Cláudio Monteiro Considera and Paulo Corrêa, 'The Political Economy of Antitrust in Brazil: From Price Control to Competition Policy' (2002) 28 Annual Proceedings of the Fordham Corporate Law Institute 533.

⁵⁵⁶ AGU (Advocacia-Geral da União), Parecer no AGU/LA-01/2001 (Anexo ao Parecer GM-020), Processo n 00001.006908/2000-25 <<http://www.agu.gov.br/atos/detalhe/8413>> accessed 16 February 2018.

⁵⁵⁷ *Folha de S. Paulo*, 'Bancos lideram doações para campanha de FHC' (26 November 1998) <<http://www1.folha.uol.com.br/fsp/brasil/fc26119803.htm>> accessed 16 February 2018.

For former commissioner Celso Campilongo, the government made it clear: it did not want Cade to have jurisdiction over the banking market.⁵⁵⁸ In other words, the government tried to grant to the financial sector an immunity from the Competition Act and its enforcement by Cade.

When Cade was about to hear the first banking sector case after the presidential approval of the AGU's opinion,⁵⁵⁹ commissioner Campilongo accidentally met Cardoso's minister of justice at a restaurant. According to Campilongo, the minister of justice, José Gregori, made the following joke:⁵⁶⁰

- Gregori: 'how many floors does Cade's building have?'
- Campilongo: 'two.'
- Gregori: 'And how many floors does the Bacen (Central Bank)'s building have?'

Commissioner Campilongo then laughed because Bacen's building is the tallest in Brasília, with twenty-one floors; while Cade's building had only two floors at the time. The minister of justice was implying that the Bacen is much more important or powerful than Cade. Subsequently, the minister reportedly said:

- 'Look, pay attention to what you are going to do with that case.'

⁵⁵⁸ Campilongo, 'Entrevista' 154.

⁵⁵⁹ Ato de Concentração nº 08012.006762/2000-09.

⁵⁶⁰ Celso Campilongo, 'Painel 7 — Antitruste no setor bancário e de meios de pagamento' (22º *Seminário Internacional de Defesa da Concorrência do IBRAC*, 12 December 2016) at 31:25 <<https://youtu.be/KUXaTcLSDRg>> accessed 7 March 2018.

Although Campilongo and other Cade's commissioners have challenged the constitutionality and legality of the presidential approval of the AGU's opinion, the antitrust immunity for the financial sector since then has been the object of a judicial dispute, which is now being analysed by the Supreme Court (STF), as of June 2018.⁵⁶¹

6.4.4. Construction, Engineering and Urban Infrastructure sector

Perhaps the first controversial antitrust case in the construction sector emerged in 2014, when Operation Car Wash began and revealed cartelisation practice in the sector, as part of a massive *quid pro quo* corruption scandal.⁵⁶²

The cartel between the largest Brazilian construction corporations in public bids conducted by Petrobras (for contracting onshore engineering, construction and industrial assembly services) was the one which most affected democratic game in the country, as it will be seen in chapter eight.⁵⁶³ Although there is certainly no evidence from which to draw any causation as of February 2019, it is disturbing that the same government coalition parties (led by the Workers' Party) who benefited from the scheme, were also in charge of the maintenance of Cade's structure (that did not discover the cartel). On the one hand, the ruling coalition was in charge of nominating people for Cade's top

⁵⁶¹ STF, RE 664189. For a brief analysis of the progress of the judicial dispute — see Jean-Paul Veiga da Rocha, 'Bancos, lei antitruste e a decisão do ministro' *O Estado de S. Paulo* (19 August 2014) <<http://www.valor.com.br/opiniaio/3658802/bancos-lei-antitruste-e-decisao-do-ministro>> accessed 16 February 2018.

⁵⁶² Jonathan Watts, 'Operation Car Wash: Is this the biggest corruption scandal in history?' *The Guardian* (1 June 2017) <<https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>> accessed 16 February 2018.

⁵⁶³ Processo Administrativo nº 08700.002086/2015-14. The corruption scheme between the cartel, politicians and Petrobras bureaucrats will be described in more details in chapter eight. The unleashing of the Car Wash cartel unfolded other antitrust investigations concerning other alleged construction cartels involving the same large corporations, such as on the construction of facilities for the 2014 FIFA World Cup (Inquérito Administrativo nº 08700.006630/2016-88), on public bids for the construction of railroads (Inquérito Administrativo nº 08700.001836/2016-11), on the public bids of the City Hall of Rio de Janeiro (08700.003344/2017-41) and on the metro and monorail infrastructure public bids in seven states and the federal district (Processo Administrativo nº 08700.003241/2017-81).

positions and setting the agency's budget. On the other hand, the longer the cartel and corruption scheme lasted, the more donations from construction companies the ruling government coalition would have to win elections (see the dynamics of the *quid pro quo* scheme in section 8.2).

Nonetheless, the unfolding of Operation Car Wash revealed evidence that the construction sector may have impacted bill n 3937/2004, which resulted in the Competition Act 2011. Cláudio Melo, who was a director of the Odebrecht corporation (the leader of the cartel), declared in a leniency agreement that senator Romero Juca intervened in the competition bill to favour the company, in exchange for campaign finance.⁵⁶⁴ However, as of June 2018, Melo's declaration lacks any further explanation, and has yet to be confirmed by the investigation.

Moreover, there is a chance that Odebrecht also had links with two other congressmen that were involved in the drafting of the bill. As we have seen in the last chapter, senator Francisco Dornelles⁵⁶⁵ introduced an amendment that gave immunity for consortia formed for public bids. And, when the bill returned to the Chamber of Deputies, deputy Pedro Eugênio⁵⁶⁶ accepted this part of Dornelles' amendment.⁵⁶⁷ At least in theory, this amendment would be in the interest of construction companies, as they often need to arrange themselves in a consortium to compete for public works.⁵⁶⁸ Although it is still an ongoing investigation, it should be noted that Dornelles and

⁵⁶⁴ MPF (Ministério Público Federal), Delação Premiada, Cláudio Melo Filho. If Melo Filho's declaration eventually gets confirmed by other pieces of evidence, a potential free-rider problem will have to be explained: while Melo Filho is referring only to Odebrecht's donation and lobbying, other construction might have benefited from it.

⁵⁶⁵ From the right-wing Populist Party.

⁵⁶⁶ From the centre-left Workers Party.

⁵⁶⁷ See subsection 5.3.2.

⁵⁶⁸ See Inquérito Administrativo n° 08700.004468/2017-44, Inquérito Administrativo n° 08700.003240/2017-37 and Processo Administrativo n° 08700.003241/2017-81.

Eugênio are now being investigated for possibly having received illegal electoral contributions from Odebrecht.⁵⁶⁹

Nevertheless, while it might be tempting to state that Odebrecht impacted the legislative process of the Competition Act 2011, this cannot be determined from the evidence provided by the ongoing investigations as of June 2018.

6.4.5. Agribusiness

In 2017, another *quid pro quo* scandal shocked Brazil: it involved Joesley Batista, who is the controller of JBS, the world's largest meat producer and the top donor of the 2014 federal elections; Michel Temer, the president of Brazil, and a key member of his staff, deputy Rodrigo Loures; and members of Cade. In a leniency agreement, Batista declared that Temer and Loures agreed to deliver a Cade decision, in exchange for money. More specifically, Temer and Loures would make Cade issue a preventive measure to stop Petrobras from practising alleged anticompetitive practices against a company in Batista's group, EPE (acronym in Portuguese for *Empresa Produtora de Energia*).⁵⁷⁰ And, in return, the businessman offered the politicians 5% of the profit that his company would get as a result of Cade's preventive measure.

Batista first met Temer in a non-registered out of office hours appointment, when the businessman exposed his worry about the appointment of the new Cade head, among other topics.⁵⁷¹ At the end of the conversation, Temer said to Batista that 'the

⁵⁶⁹ Fernando Rodrigues, 'Documentos da Odebrecht listam mais de 200 políticos e valores recebidos' *UOL Notícias* (23 March 2016) <<https://fernandorodrigues.blogosfera.uol.com.br/2016/03/23/documentos-da-odebrecht-listam-mais-de-200-politicos-e-valores-recebidos/>> accessed 16 February 2018.

⁵⁷⁰ Inquérito Administrativo nº 08700.009007/2015-04. Petrobras is a state monopolist firm in the gas supply market. The case discusses price discrimination and refusal to contract.

⁵⁷¹ To listen and read the whole conversation, see *Folha de S. Paulo*, 'Leia na íntegra a conversa entre o presidente Temer e Joesley Batista' (19 May 2017)

best way’ to talk to him was through Loures. Subsequently, Batista met Loures and offered the *quid pro quo* agreement, and Loures accepted the deal not only in his but also in Temer’s name, according to Batista’s perception.⁵⁷² During a meeting with the businessman, Loures called the interim head of Cade, Gilvandro de Araújo, and asked Araújo to take a ‘sympathetic’ look at EPE’s request concerning the preventive measure. To which the Cade head replied: ‘ok’.⁵⁷³

According to Batista, Loures’ contact with Araújo had a positive effect: after the call, members of Cade allegedly warned Petrobras’ lawyers that the agency could impose severe sanctions on the company.⁵⁷⁴ This arguably led Petrobras to enter into an agreement with EPE, under terms that interested Batista. Due to the new deal with Petrobras, Batista’s corporation was able to regain profits and thus the businessman began to pay the promised bribe to Loures.⁵⁷⁵

Cade denies any wrongdoing,⁵⁷⁶ and indeed, at least as of June 2018, apparently there is no evidence of illegality concerning the agency: Cade did not issue the preventive measure and there is no evidence that any of Cade’s members ‘warned’ the Petrobras’ lawyers, as Batista has claimed.

In any event, the scandal shows that (i) elected politicians may have incentives to influence Cade’s enforcement because it potentially generates resources (the case involved bribes, but it could be other resources, such as legal campaign finance); and (ii) a contact made by an elected politician, or a member of his staff, has a special feature —

<<http://www1.folha.uol.com.br/poder/2017/05/1885414-leia-na-integra-a-conversa-entre-o-presidente-temer-e-joesley-batista.shtml>> accessed 16 February 2018.

⁵⁷² MPF (Ministério Público Federal), Delação Premiada, Joesley Batista, Anexo 9.

⁵⁷³ DPF (Departamento de Polícia Federal), Inquérito Policial nº 4483/DF (RE 91/2017-1), fls 858–859.

⁵⁷⁴ Procuradoria-Geral da República, Inquérito Policial nº 4483/DF (RE 91/2017-1), pg 19.

⁵⁷⁵ Ibid.

⁵⁷⁶ Cade (Conselho Administrativo de Defesa Econômica), ‘Esclarecimentos do Cade sobre o termo delação de Ricardo Saud’ (20 May 2017) <<http://www.cade.gov.br/noticias/esclarecimentos-do-cade-sobre-o-termo-delacao-de-ricardo-saud>> accessed 16 February 2018.

Cade will inevitably have one of its members, usually its head, in frequent contact with politicians to discuss matters such as the agency's budget, and this politician may make comments or requests concerning a specific ongoing antitrust case, which will may have a special weight for the agency's members (see section 6.3).

6.5. Conclusion of the chapter

I have discussed several ways in which political finance corruption can potentially harm the democratic integrity of antitrust enforcement. The harm may occur through the democratic controls on Cade: (i) the *appointment process*, (ii) *budget and human resources* setting, and (iii) the *natural and tacit restraint* that agency's officers may have regarding the political bodies. Moreover, the harm can also occur (iv) through the impact that political finance might have on the *political pressures and contacts*.

However, we need to draw conclusions with caution: in practice, it is not very clear to what extent Cade's officers are naturally and tacitly restrained by the politicians that are seated in the Presidency of Republic and in the Congress.

Similarly, although it is tempting to state that different parties in government may set different levels of budget, and that different levels of budget cause an increase or decrease of enforcement, perhaps we need more evidence before sustaining that the democratic integrity of antitrust enforcement was harmed in this aspect.

Likewise, although the top five economic sectors in terms of donations seem to have a concern with antitrust enforcement, and although some politicians may have incentives to follow the corporate wishes, it is unclear how effective the political pressures or contacts on Cade really have been.

But we do have more evidence about the impact of Cade's composition on antitrust enforcement. There are records of large Brazilian corporations lobbying elected politicians on the nominations, which indicates that those firms believe that the agency's composition matters. Politicians and their parties also have the same belief, as some reports indicate. And, perhaps most importantly, firms and politicians' beliefs were statistically proven to be accurate: empirical research of Moran and others on more than 5,091 merger cases has found that enforcement varied according to the party that made the nomination.

In this sense, if we have concluded in subsections 3.4.1 and 5.4.2 that war chest corruption apparently occurred in the federal elections between 1994 and 2014, obstructing the level playing field in elections, *we may argue that the democratic integrity of antitrust enforcement was apparently impaired*, since we do have evidence suggesting that Cade's composition, chosen by the elected politicians, impacts the enforcement of the legislation.

Elections are important. Their integrity is central not only to guarantee people's confidence in democracy, but also to foster people's trust in the capitalist democracy set by the Brazilian constitution. Chapter four showed that different countries, including Brazil, have considered the *appearance* that political donations have harmed the integrity of elections as sufficient to justify political finance reforms. In this fashion, I have argued that the appearance of consequent lack of democratic integrity of the rules for capitalism and of their enforcement may be considered as additional justifications for the reform of political finance legislation. So far as competition law is concerned, we have seen in chapter five and this chapter six that the confidence we should have on the democratic integrity of the antitrust legislation and its enforcement has been impaired, at least partially.

But this (the harm on the confidence we should have on the democratic integrity of the rules of capitalism) is only one additional justification for a reform of the political finance legislation. As we will in the next part of the thesis, there are a few other ones, which are no less important.

Part C

A proposal for reform

Chapter Seven

The foundations for a regulation of the economic resources that enable concentration of political speech

Public opinion not because it is located *in* the
public, but because it is made *by* the public.

Giovanni Sartori⁵⁷⁷

7.1. Introduction

We have seen in Part B of this thesis that election's appearance of integrity is key to guaranteeing people's confidence in democracy, and that political finance corruption may harm that trust. We have further seen that political finance corruption may harm the confidence we should have in the democratic integrity of the rules of capitalism.

In this aspect, if we want to protect the capitalist democracy established by the Constitution, perhaps we should try to have a political finance system which best avoids the appearance of corruption. Or, based on Sartori's passage quoted in the epigraph, we should make an effort to have legislation which foster the appearance of electoral integrity in the sense that elections actually reflect a free formation of public opinion. This is the scope of Part C of this thesis. Although recent political finance reforms did

⁵⁷⁷ Giovanni Sartori, *Elementos de Teoría Política* (Alianza Editorial 1992) 152.

ban corporate donations and establish spending limits, the current political finance system still largely allows economic inequality to be translated into political inequality⁵⁷⁸ and, as such, still largely permits the occurrence of political finance corruption, as will be addressed in this Part C.

Perhaps whenever we propose our ‘ideal’ political finance regulation, we reveal signs about the conception of democracy we have underlying it: the rules we propose will depend on our conception of democracy. The following proposal will be based on a Rawlsian conception of democracy — as such, it will be grounded on normative values that transcend the instrumental one mentioned in the paragraph above. But, as far as possible, I will also briefly discuss to what extent this proposal is compatible with a Schumpeterian conception of democracy, particularly when advancing practical regulation.

Part C is organised as follows: the present chapter (seven) will propose a theoretical framework for an egalitarian regulation of economic resources to compete in politics. And the next two chapters — chapters eight and nine — will discuss its practical implications for political finance and media regulation.

The present chapter is divided into two sections. Section 7.2 argues that the Brazilian Constitution has adopted an *egalitarian model of electoral regulation*, and discusses what that means and the philosophical justifications for it. And section 7.3 discusses the foundations for a regulation of *economic resources that may lead to concentrations of speech* in political deliberation. In this respect, it acknowledges the organic link between political finance and media regulation in mass media democracies, and argues that both forms of regulation should adopt the ‘free formation of public opinion’ as a clear paradigm, and construct precise rules taking that into account.

⁵⁷⁸ See chapter three.

Roberto Unger once said that reform proposals on democracy have been frequently labelled as either utopian or trivial. If one proposes something distant, people may say: interesting, but utopian. If one proposes something close, people may say: feasible, but trivial.⁵⁷⁹ I hope the following proposal falls somewhere between the utopian and the trivial.

7.2. The Brazilian egalitarian model of electoral regulation

After setting two models of electoral regulation, this section will discuss why the text of the Constitution shows that it has chosen an egalitarian one. Next, it will explore potential philosophical justifications for it. And then will try to define the exact meaning of that model in the light of terms used by the Constitution.

7.2.1. The models of electoral regulation

Colin Feasby argues that there are two models of electoral regulation, broadly speaking: the egalitarian and the libertarian.⁵⁸⁰

⁵⁷⁹ Roberto Mangabeira Unger, *Democracy Realized: The Progressive Alternative* (Verso 2001) 29.

⁵⁸⁰ Colin Feasby, 'Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model' (1999) 44 McGill Law Journal 5 10. In order to set his models of electoral regulation, Feasby finds inspiration in Frederick Schauer's egalitarian and libertarian conceptions of democracy. Frederick Schauer, 'Judicial Review of the Devices of Democracy' (1994) 94 Columbia Law Review 1326. It should be noted that other scholars have used several different terms to express these same ideas — for instance, the Spanish scholar Óscar Sánchez Muñoz calls the egalitarian model *garantía de la opinión pública libre* model (the 'guarantee of free public opinion' model), and the libertarian model as *libre mercado de las ideas* ('free market of ideas' model). Óscar Sánchez Muñoz, *La Igualdad de Oportunidades en las Competiciones Electorales* (Centro de Estudios Políticos y Constitucionales 2007). Owen Fiss, Joshua Cohen and Aline Osório have used other terms to express these same meanings. Owen M Fiss, *The Irony of Free Speech* (Harvard University Press 1996). Joshua Cohen, 'Democracy v. Citizens United?' (The 2011 Dewey Lecture in Law and Philosophy, 20 April 2011) <<https://www.law.uchicago.edu/recordings/joshua-cohen-democracy-v-citizens-united>> accessed 7 November 2017. Aline Osório, *Direito Eleitoral e Liberdade de Expressão* (Fórum 2017).

The egalitarian model is based on three premises: (1) equality of liberty is more important than absolute liberty; (2) equality of liberty may only be achieved by limiting the freedoms of the wealthy; and (3) this may only be achieved through state action.⁵⁸¹

By contrast, the libertarian view holds that ‘the citizen as a voter has a right to uncontrolled access to information’ because ‘only the voter can decide what is or is not relevant to that voter's decision’.⁵⁸² Therefore, people should not trust government to set rules for the election of future governments and ‘any manipulation of the flow of information affects the ability of the electorate to be sovereign’.⁵⁸³ Therefore, any attempt by the government to level the playing field in order to ensure all voices to be heard is illegitimate.

7.2.2. The Brazilian egalitarian model established by the Constitution

Which model is embraced by Brazil?⁵⁸⁴

Brazil has a comprehensive Constitution, promulgated in 1988, which structures the state. In this regard, one of its aims is to protect society against the misuse of economic power.⁵⁸⁵

The Constitution not only establishes that the ‘law shall repress the *abuse* of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits’ (article 173, paragraph 4), but also that the law

⁵⁸¹ Feasby, ‘Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model’.

⁵⁸² Ibid.

⁵⁸³ Ibid.

⁵⁸⁴ For a brief comparison between the egalitarian model in Canada and the libertarian model in the US — particularly after *Citizens United v Federal Election Commission*, 558 US 310 (2010) — see Robert C Post, ‘Second Lecture: Campaign Finance Reform and the First Amendment’ in Robert C Post (ed), *Citizens Divided: Campaign Finance Reform and the Constitution* (The Tanner Lectures on Human Values, Harvard University Press 2014) 48.

⁵⁸⁵ Carlos Ari Sundfeld, *Fundamentos de Direito Público* (4a edn, Malheiros Editores 2009) 55.

should protect the ‘*normality and legitimacy*’ of the elections against the *influence* of the economic power’ (art. 14, paragraph 9).⁵⁸⁶ In other words, the Constitution aims to protect society not only against manifestations of abuse of economic power in economic markets, but also against manifestations of economic power in elections.

It should be highlighted that the Constitution uses the term ‘abuse’ when referring to the manifestation of economic power in economic markets. The constitutional text also uses the term ‘abuse’ when referring to the ‘*holding of office, position or job* in the direct or indirect public administration’ (art. 14, paras 9).⁵⁸⁷

However, *the Constitution does not use the term ‘abuse’ when referring to the manifestation of economic power in elections.* The constitutional text establishes that the law should protect elections against the mere ‘*influence*’ of economic power. This indicates that a *mere influence* of economic power is enough to attempt against the normality and legitimacy of an election. As put by Carlos Ayres Brito, former Justice of the Brazilian Supreme Court, the Constitution implies that any influence of economic power in elections is abusive.⁵⁸⁸

And, in order to protect ‘elections against the influence of the economic power’, state action is inescapable. Therefore, the Brazilian Constitution has adopted an egalitarian model of electoral regulation.

Surely it is impossible to insulate elections from *all* influence of economic power in a capitalist democracy. Economic power derives from wealth, and wealth will

⁵⁸⁶ Constituição Federal do Brasil, 1988 (emphasis added).

⁵⁸⁷ (Emphasis added). According to the Constitution, the law should protect the ‘normality and legitimacy of elections’ against ‘the abuse in the holding of office, position or job in the direct or indirect public administration’.

⁵⁸⁸ Carlos Ayres Britto, ‘Empresa que financia campanha eleitoral comete abuso de poder econômico’ *Consultor Jurídico* (31 May 2015) <<https://www.conjur.com.br/2015-mai-31/ayres-britto-empresa-financia-campanha-comete-abuso-poder-economico>> accessed 3 November 2018. For Britto, there is no way for the economic power to participate in elections without ‘calling the shots’.

inevitably be distributed unequally in a capitalist society.⁵⁸⁹ Wealthy people will have more money to invest in education, for instance, which may reflect on their ability to influence elections.⁵⁹⁰ Similarly, liberal democracies (such as Brazil) have the free media as one of their pillars, and a significant part of the Brazilian media is privately-owned. Privately-owned media corporations will inevitably use their economic power to influence the election because of the nature of their business.

That said, article 14 paragraph 9 of the Constitution indicates that law should insulate the electoral process from inequalities of wealth, as far as possible; at least if read from a Rawlsian perspective. To put it another way, the Constitution indicates that law should insulate the electoral process from inequalities of wealth, but within the practical limits of the Brazilian liberal democracy.⁵⁹¹ In this regard, the egalitarian model of electoral regulation does not require the state to interfere with a newspaper's editorial discretion, for example. But it requires the state to work to guarantee a plural and diverse democratic debate within the limits delimited by the liberal democratic framework, to which a free press is key.

Nonetheless, I must say: not everyone agrees with the way I have interpreted article 14 paragraph 9 of the Constitution.⁵⁹² For instance, although justices Teori Zavascki⁵⁹³ and Gilmar Mendes⁵⁹⁴ acknowledged that Brazil has an egalitarian model of electoral regulation, they did so under a more Schumpeterian perspective of democracy (in the *ADI 4650* case). They assumed that it was impracticable to prevent corporations

⁵⁸⁹ For a definition of economic power, see footnote 4.

⁵⁹⁰ See subsection 7.3.6.

⁵⁹¹ For a definition of liberal democracy, see footnote 255.

⁵⁹² Disagreements on whether a given regulation promotes or undermines electoral integrity may be even more frequent in societies with deep political polarization. See Pamela S Karlan, 'Citizens Deflected: Electoral Integrity and Political Reform' in Robert C Post (ed), *Citizens Divided: Campaign Finance Reform and the Constitution* (The Tanner Lectures on Human Values, Harvard University Press 2014) 142.

⁵⁹³ See, eg, STF ADI 4650/DF, Inteiro Teor do Acórdão 154–157.

⁵⁹⁴ See, eg, *ibid* 248–249.

from intervening in elections, and argued that the goal of the law should be to assure a political competition framework that enables people to alternate the ruling party.⁵⁹⁵ For them, economic power in general (and corporations in particular) can influence elections, as long as they do not distort competition between political elites. In that sense, both justices argued in favour of equality of opportunity between political elites and the need for spending limits. Similarly, in the other main case decided by the Court after the 1988 Constitution concerning corporate donations (the *ADI 1076-0*, heard in 1994), Justice Sepúlveda Pertence, who delivered the leading opinion of the majority, also implied an egalitarian model of electoral regulation within a Schumpeterian conception of democracy.⁵⁹⁶ In the two main cases after the promulgation of the 1988 Constitution where corporate donations were directly discussed, no justice argued for a libertarian model of electoral regulation, as far as the Court's dockets show.

Thus, although as far as I can see it is not possible to argue that the Brazilian model of electoral regulation is a libertarian one because of the limitations imposed by the article 14 paragraph 9 of the Constitution, I must acknowledge that some lawyers see the Brazilian egalitarian model under a Schumpeterian conception of democracy.

7.2.3. The philosophical justifications for an egalitarian model of electoral regulation

John Rawls' ideas provide an important inspiration for an egalitarian model of electoral regulation. As Feasby points out, Rawls' ideas are quite general.⁵⁹⁷ Thus,

⁵⁹⁵ The third opinion for the dissent, Celso de Mello's, was quite short, which gave this reader no hint about his conception of electoral regulation.

⁵⁹⁶ Although Mr Pertence argued that corporations should be allowed to donate (even though trade unions were banned), he reasoned that there should be a uniform and effective limit to private donations. STF, ADI 1076-0, Voto Justice Sepúlveda Pertence, parágrafo 12.

⁵⁹⁷ Feasby, 'Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model'.

although Rawls writes having the American First Amendment in mind, his points make sense in other contexts. In that sense, several scholars, such as Feres Júnior and San Assumpção,⁵⁹⁸ and justices of the Brazilian Supreme Court have used Rawls' theoretical contributions to discuss the Brazilian state.⁵⁹⁹

For Rawls, “citizens similarly gifted and motivated [should] have roughly an equal chance of influencing the government’s policy and of attaining positions of authority irrespective of their economic and social class”.⁶⁰⁰ Therefore, under the egalitarian model, from a Rawlsian democracy perspective it is not only people’s votes that should have the same weight, but in addition citizens should have roughly an equal chance of *influencing the government’s policy and the Congress’ lawmaking (by being able to be heard in elections and in non-electoral political deliberation) and of occupying the institutionalised political power (that is, the executive and legislative branches)*.⁶⁰¹

The Brazilian Constitution’s choice for the egalitarian model might actually reflect the justification for democracy itself. Whenever one holds power over another (be it in a family, in a state, and so forth), the problem of legitimacy arises. And, if we interpret the Constitution as the Brazilian social contract, the equalisation of political

⁵⁹⁸ See João Feres Júnior and San Romanelli Assumpção, 'Financiamento de Campanha, Mídia e Liberdade Política' in Marcus Ianoni (ed), *Reforma Política Democrática: Temas, Atores e Desafios* (1 edn, Perseu Abramo 2015).

⁵⁹⁹ See, eg, STF, ADI 2566 Rel Min Alexandre de Moraes, Voto Vencedor Min Edson Fachin, DJ 16/05/2018; ADI 4439, Rel Min Luís Barroso, Voto Vencedor Min Alexandre de Moraes, DJ 27/09/2017; ADPF 54/DF, Rel Min Marco Aurélio, DJ 12/04/2012.

⁶⁰⁰ Rawls, 'The Basic Liberties and their Priority' 73. It should be noted that Rawls' standard does not establish that everyone should have equal *political power* all the time. Indeed, the egalitarian model of electoral regulation in every *representative democracy* allows *unequal political power for politicians that were elected*. Copp argues that this is justified because we want efficiency in carrying out political decisions and administering the state. Therefore, Copp argues, ‘our equal stake in society is still properly acknowledged, provided that the power to elect people to positions carrying extra power is allocated equally among all of us, and provided that the people so elected only possess the extra power for limited periods of time’. Copp, 'Capitalism versus Democracy: The Marketing of Votes and the Marketing of Political Power' 90.

⁶⁰¹ The chance should be *roughly* equal because some personal circumstances (such as being a celebrity) and certain individual abilities (such as being charismatic) may help those people to have more influence.

power among citizens may come as a matter of logical fairness. This justification can be summarised as the following: (1) given that we have no option but to belong to some state; (2) given that the state organises the most basic aspects of our lives, which affect our life prospects in a fundamental way; (3) we should all have equal power over the state's decisions, as a matter of fairness.⁶⁰²

Perhaps the Brazilian democracy also has a second justification under the egalitarian perspective, which is an instrumental one: by having equal opportunity to influence or occupy institutionalised political power, people hope that the state will be more responsive to their needs. The question is whether democracy is indeed more responsive than other forms of political regimes. Nevertheless, it is likely that the majority of Brazilians would not choose to have an authoritarian regime even if we had evidence that it delivers better policies than a democracy.⁶⁰³

In sum, I take the view that Brazilians regard that (i) political liberties are self-justified; and (ii) political liberties, such as equal opportunity to influence or occupy the state, will *likely* make it more responsive.

⁶⁰² See Copp, 'Capitalism versus Democracy: The Marketing of Votes and the Marketing of Political Power' 89.

⁶⁰³ As of October 2018, 69% of voters think that the democratic regime is the best political regime for Brazil, according to Datafolha polling institute. This is the highest margin since 1989, when the first poll was executed. By contrast, only 12% of voters point to dictatorship as a better regime than a democracy. Another 13% of respondents said "whatever" political regime would work; and 5% preferred not to answer. Paulo Passos, 'Democracia tem aprovação recorde no Brasil' *Folha de S. Paulo* (5 October 2018) <<https://www1.folha.uol.com.br/poder/2018/10/democracia-tem-aprovacao-recorde-no-brasil.shtml>> accessed 3 November 2018.

7.2.4. The definition of a ‘normal’ and ‘legitimate’ election

As we have seen, the Constitution establishes that elections should be ‘normal’ and ‘legitimate’ and that law should protect these features against the *influence* of economic power (article 14, paragraph 9). But what does that mean?

Under a Rawlsian conception of democracy, a normal and legitimate election can be characterised as one that assures three *individual* rights. Two of them relate to the opportunity of a given person to *speak* (and influence political deliberation). And a third one relates to the right to *hear* a balanced political deliberation. Finally, those three individual rights form together a fourth right: the *collective* right to a free formation of public opinion.

Both voters and candidates have a right to equal opportunity to speak. Equality between *voters* means that everyone should have equal opportunity to influence the government’s policy and the Congress’ lawmaking. To put it differently, everyone should be able to speak and be heard in political deliberation. Equality between *candidates*, in turn, means that everyone should have an equal chance of occupying the executive or legislative branch. In this sense, a candidate should have a reasonable chance to deliver his political proposal and try to convince voters.

In addition, there is another right that relates not to the capacity of *speaking* effectively but to the right to *hear* a balanced political deliberation. Only by hearing a balanced political deliberation, can voters make a *free* and *informed* decision regarding whom to vote for: *free* in the sense that it should be free from the influence of economic power, as far as possible;⁶⁰⁴ and *informed* because voters should be reasonably informed

⁶⁰⁴ It should be noted, however, that a free vote may also mean ‘free of intimidation’, which is perhaps how the term is mostly applied when referring to free voting. See, eg, Graeme Orr, ‘The Law of Electoral Democracy: Theory and Purpose’ (2018) Working Draft for ‘Constitution of Social Democracy’ Workshop in Honour of Keith Ewing 3.

about different political proposals, arguments and narrative perspectives. And only when voters can make a free and informed decision, representative democracy is justified. Thus, even if a given voter chooses not to speak in political deliberation, he has the right to hear balanced political deliberation.⁶⁰⁵

A legitimate and normal election — in which everyone has an equal opportunity to speak and hear a balanced political deliberation — allows an appearance of a *free formation of public opinion*.⁶⁰⁶

So far, we have seen the meaning of a ‘normal’ and ‘legitimate’ election under a Rawlsian perspective of democracy. But under a Schumpeterian conception of democracy, those terms may have a different meaning. Under this view, elections are normal and legitimate as long as competition between political elites is not distorted, in the sense that the people have at least one option to alternate the ruling party. For them, economic power in general (and corporations in particular) can influence elections, as long as this does not distort the competition between political elites in that sense. Along these lines, the voter’s choice should be free from the monopolisation of political speech; and informed by hearing at least two different political proposals, arguments and

⁶⁰⁵ Instrumentalists may argue that what must be relevant is the force of the argument or the report itself, not the number of times it has been conveyed. As argued by Lord Bingham of Cornhill, repetition may condition the citizen to accept an argument or a report. See, *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15. Moreover, for instrumentalists, if we have in mind a model of deliberative democracy, citizens not only ‘have an interest in seeing their preferred option represented and argued for as well as possible’, but also ‘also have an interest in being able to revise their view and, in particular, in being presented with the best possible evidence and arguments for the alternatives’, as Harry Brighouse argued. A collective decision made without equality in political deliberation is a weaker one because citizens might change their mind once confronted with alternative views. Therefore, citizens should have access to the arguments and counterarguments before a collective decision has been made, in order to produce a stable and strong collective decision. See Harry Brighouse, ‘Political Equality and the Funding of Political Speech’ (1995) 21 *Social Theory and Practice* 473–482. However, in my view, there is no guarantee that people will be convinced because of the rational ‘strength’ of the argument rather than other factors, such as the charisma of the speaker. In my view, citizens have the right to an equal opportunity to speak, even if this does not necessarily lead to a stronger and stable collective decision, due to the justification for the democracy itself as a form of legitimising the power of the state over citizens.

⁶⁰⁶ For arguments on the importance of laws to enable a free formation of public opinion within the American context, see Post, ‘Second Lecture: Campaign Finance Reform and the First Amendment’.

narrative perspectives. Thus, for those who hold a Schumpeterian perspective of democracy, public opinion is freely formed when there is a balanced political debate between at least two alternatives.

In sum, a ‘normal’ and ‘legitimate’ election is one where there is an appearance of integrity in the sense that *public opinion has been freely formed*, either from a Rawlsian or Schumpeterian perspective of democracy. That is what infra-constitutional legislation should be concerned with.

7.3. The regulation of the forum of political deliberation

Public opinion is formed within a public sphere, which I will call the forum of political deliberation. This section will begin by discussing what the ‘forum of political deliberation’ means. Subsequently, I will argue that there are two regulatory areas that deal directly with the formation of public opinion: political finance and media regulation. After arguing that these regulations should not tolerate unlimited concentrations of political speech, I will then state what their principles should be. Finally, I will briefly discuss the present proposal’s temporal extent, limitations, and proper regulatory bodies.

7.3.1. The definition of the forum of political deliberation

By using the term ‘forum of political deliberation’, I mean the public space of a given society where political speech is spoken and heard. Political speech is performed by (i) citizens who want to engage in political discussions; (ii) the media; and (iii)

political parties and their politicians. I label it as a ‘forum’, and not as a ‘marketplace’ to reinforce the idea that money should have no relevance here.⁶⁰⁷

In the past, the forum of political deliberation occurred in meeting places, such as public squares or coffee houses. But several authors, such as C. Wright Mills and Jurgen Habermas, have noted that the emergence of new forms of media largely transformed the public ‘into mass’.⁶⁰⁸ Two-way communication between those in a society of communities contrasts with one-way communication in a mass society, where those who control or have access to the mass media have more opportunity to influence the formation of public opinion.⁶⁰⁹

It is true that the rise of the internet has softened the ‘one-way’ communication characteristic of the mass society — now anyone can post something on social media or write a blog. Nonetheless, the one-way communication feature of mass society is still present nowadays. People watch the news, read newspapers, and listen to the radio. Media companies have resources to cover a whole range of topics and have a reputation for being trusted sources. In this sense, there is a significant distance between the power of

⁶⁰⁷ Furthermore, by using the expression ‘forum of political deliberation’, I want to distance myself from the term ‘marketplace of ideas’ introduced by American Justice Oliver Holmes because the regulation proposed here is grounded on the normative principle of egalitarian democracy. Therefore, it is an end in itself, rather than a means to lead empirically to some desirable result. By contrast, Holmes arguably aimed to achieve ‘truth’ as a result of the competition of ideas in the market. See Vincent Blasi, ‘Holmes and the Marketplace of Ideas’ (2004) *The Supreme Court Review* 1 3. Perhaps it is indeed likely that more people will consider the political decision a rational one if we have an egalitarian political deliberation, but this should not be the first justification of an electoral regulation, in my view — see subsection 7.2.3. Moreover, I do not use the term ‘ideas’ because ideas are not the only thing that matters in the political public debate. The mere reporting of news, from a given perspective, is relevant. Ideas, thus, would be an imprecise term. The term ‘speech’ or ‘discourse’ encompasses ideas, arguments and reports. Similarly to the term I use, Ron Levy and Graeme Orr use the denotation ‘deliberative forum’ to include the ‘macro-level public discourse’, such as election campaign and the involvement of citizens, civil society, the media, and so forth; in exchanging information, ideas, arguments, discourses, social perspectives, and so on. Ron Levy and Graeme Orr, *Law of Deliberative Democracy* (Routledge 2018) 124–125.

⁶⁰⁸ According to Douglas Kellner, ‘Habermas, the Public Sphere, and Democracy’ in Diana Boros and James M Glass (eds), *Re-Imagining Public Space: The Frankfurt School in the 21st Century* (Palgrave Macmillan US 2014); making reference to C Wright Mills, *The Power Elite* (Oxford University Press 1957), and Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press 1989).

⁶⁰⁹ Kellner, ‘Habermas, the Public Sphere, and Democracy’.

communication of a television channel and the power of communication that most citizens have when reporting an event on social media (see subsection 8.3.2 for a deeper discussion).

The current public space for political deliberation is primarily the media: television and radio stations, the internet, mass circulation newspapers, and, to a much lesser degree, large meeting places.⁶¹⁰ Especially in the federal elections of countries such as Brazil, where the constituency is extensive and frequently populous, political parties' events (party conventions, rallies, debates, inaugurations, visits, public pronouncements, and so on) are now planned as events for the media.⁶¹¹

It is hard to explain how exactly the formation of public opinion works in current societies. Sartori argues for a cascade model.⁶¹² This model describes the formation of public opinion as a series of descending processes in cascade, whose falls are contained at intervals by lakes, in which they are re-mixed. According to this cascade model, there are five 'lakes' (that is, levels). In the first level, rests the economic and social elites; in the second level, the political and government elites; and so on.⁶¹³ I have some reservations about this model. For example, I am not entirely convinced that political and government elites are at a lower level than economic and social elites.

In my view, the formation of public opinion works more as a model of *several simultaneous waterfalls*: various sources (businessmen, political leaders, the government, the media, celebrities, common citizens, community leaders, experts, and so on) are 'waterfalls' that simultaneously throw their speech in several independent lakes. These independent lakes eventually connect and mix, forming the public opinion

⁶¹⁰ Brighouse, 'Political Equality and the Funding of Political Speech' 477.

⁶¹¹ Lima, *Grande Mídia vs. Nova Mídia na Política Brasileira*.

⁶¹² Sartori was largely influenced by a model proposed by Karl W Deutsch, *The Analysis of International Relations* (Prentice-Hall 1968).

⁶¹³ Sartori, *Elementos de Teoría Política*, 153.

of the demos, which will still have fragments. The problem is that these ‘waterfalls’ are unequal. As I have just argued, there is a distance between the power of communication of a television channel and the power of communication that most citizens have when reporting an event on social media.

Therefore, we need to make sure that the waterfalls are not overwhelmingly unequal and that the mainstream mass media ‘waterfalls’, which are more powerful, represent diverse views.

Perhaps, as Sartori argues, a complete autonomous public opinion might not exist or be possible.⁶¹⁴ But certain norms should be established in the process of public opinion formation, particularly in elections, to boost the appearance of representative democracy’s integrity.⁶¹⁵

7.3.2. The organic connection between political finance and the media

Academics, politicians and law enforcers have largely neglected the fact that political finance and media regulation deal with the same object: the formation of public opinion.

As such, they have an organic connection and may impact each other. For instance, setting low spending limits for political parties in elections suggests that the voice of the traditional media will increase in the forum of debate. And this may be a problem if the media lacks plurality of ownership and diversity of content. I will give a practical example: if the media is concentrated and conservative, setting a low spending limit for political parties (which will include the main progressive party), will likely enhance the conservative arguments in the forum of deliberation.

⁶¹⁴ Ibid.

⁶¹⁵ Sánchez Muñoz, *La Igualdad de Oportunidades en las Competiciones Electorales*, 56.

Considering the organic connection between those two laws, the absence of media regulation (to foster plurality and diversity) *undermines* the justification of political finance regulation as an instrument to give ‘everyone equal opportunity to influence the democratic debate’ under the Rawlsian conception of democracy. After all, in a mass society, media owners will inevitably have more opportunity to impact political deliberation than most citizens. And there will be even less equality of opportunity to speak in a given society that has an overwhelming concentration of media ownership.

Similarly, the absence of media regulation *undermines* the justification of political finance regulation as an instrument to give everyone ‘equal opportunity to compete for office’. Say, for example, that the media is concentrated and mostly conservative. The effectiveness of political finance legislation intended to equalise parties’ arms to compete will be significantly impaired because parties and candidates aligned with a conservative ideology will have a competitive advantage due to the support of the media.⁶¹⁶

Along these lines, so far as the right to hear to a balanced debate is concerned, political finance regulation is less effective if the country does not regulate the media. Even if political finance regulation is somewhat efficient (and even if legislation requires some media to act with ‘due impartiality’), people will *not* hear a balanced political deliberation if the media is concentrated and its content is lowly diverse. This will be explored in the next chapter.

⁶¹⁶ Feres Júnior and Assumpção argue that, from a Rawlsian perspective, the problem of low diversity within the Brazilian media is ‘analogous’ to the problem of political finance. Their focus is on the arguably competitive disadvantage that left-wing candidates and parties may have in Brazil due to lack of representation in the media. Feres Júnior and Assumpção, ‘Financiamento de Campanha, Mídia e Liberdade Política’.

Under a Schumpeterian conception of democracy, both political finance and the media should be structured in a way to produce balanced competition that enables citizens to change the political elites who govern them. That means, in other words, that we should regulate the concentration of political speech even if we adopt a Schumpeterian perspective of democracy.

7.3.3. The *per se* intolerance of concentration of political speech

Capitalist democracy has a constant within its system: competition on the merits. In the economic sphere, this means that firms should compete for the preference of consumers; competing on price and quality of products or services. In the political sphere, competition on the merits means that voters should choose the candidate most suitable for office, having in mind the attributes (such as policy proposals, experience, charisma, moral values, skills, and so forth) chosen by voters to be relevant.

Surely both democracy and capitalism presuppose some freedom to compete. Nonetheless, the degree of protection of that freedom is different. At least according to the hegemonic conceptions of political competition in democracy and economic competition in capitalism.

When we talk about *democracy* in a liberal democracy, we are in the end talking about the formation of public opinion. That is, we talk not only about the freedom to compete in politics, but more specifically how that freedom interacts with the formation of public opinion. And it should be highlighted that this occurs even if we take a Schumpeterian conception of democracy — under this perspective, no political party should have 100% of the media or of political finance resources, since this would seriously impair the possibility of voting out the governing party of office. If, for instance, a television corporation has 100% of a country's audience, or a political party

has 100% of the total electoral spending in an election, perhaps this country can no longer be called a liberal democracy — as Brazil, France, Germany, United Kingdom, the United States and many other countries currently are. Thus, an unlimited concentration of political speech on those terms is considered a harm *per se*.

When we talk about *capitalism* in contemporary liberal democracy, in turn, hegemonic modern⁶¹⁷ competition laws assume that some economic concentrations may benefit society, such as the concentrations derived from competition on the merits. Therefore, economic concentration is usually not considered a harm *per se*.

Competition law has two main models around the world: the American and the German. The hegemonic versions of both models tolerate concentration of economic power derived from competition on the merits, to the point of monopolies.

The US antitrust law model

Perhaps the world's most popular⁶¹⁸ paradigm in contemporary competition law comes from the US model: consumer welfare, meaning the maximisation of consumers' wealth as a result of efficiency (lower prices, better products, and so on).⁶¹⁹ This paradigm, consolidated by the Chicago School of thought, tolerates unlimited economic concentration as far as consumer welfare is not harmed.

⁶¹⁷ That is, the models of competition law that evolved after the Second War.

⁶¹⁸ Richard Whish, *Competition Law* (6th edn, Oxford University Press 2009) 4. See also 'A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A "Dialectic" on Competing Approaches' (2006) 2 *European Competition Journal* 211 220.

⁶¹⁹ Whish, *Competition Law*, 4. But some Chicago School scholars often mean that antitrust's goal is producer or total welfare. For definitions and discussion about welfare standards, see, eg, Christopher Townley, *Article 81 EC and Public Policy* (Hart 2009), 15–16.

It should be nonetheless pointed out that the US model tolerated concentration of economic power even when the Harvard School of thought⁶²⁰ — which is regarded as more interventionist than the Chicago School — prevailed among US antitrust authorities and courts.⁶²¹ Although certainly some⁶²² Harvard School scholars advocated for vigorous break ups of corporations even in case of market power resulted from competition on the merits,⁶²³ this view was not hegemonic.⁶²⁴ That is, it was not popular

⁶²⁰ The Harvard School is also frequently called as the Structuralist School due to its focus on the structure of the market. Operating through the structure-conduct-performance (S-C-P) paradigm, it assumes that some structures (ie, highly concentrated markets) lead to unwelcoming conducts (ie, anticompetitive firm behaviour), which in turn lead to poor performance (ie, higher prices and lower quality). For a description of that school of thought and references, see, eg, Roger van den Bergh, 'Economic Approaches to Competition Law' in Roger van den Bergh, Peter D Camesasca and Andrea Giannaccari (eds), *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017). In one of the most influential accounts of the Harvard School, Carl Kaysen and Donald Turner mentioned as antitrust's aim 'the attainment of desirable economic performance by individual firms and ultimately by the economy as whole', meaning outcomes like 'the achievement of the largest bundle of desired outputs from the available bundle of resources' and 'growth of total output per head and development of new cheaper production methods and new improved products'; but they did mention other aims as well, such as 'the prevention of an undue growth of big business, viewed broadly in terms of the distribution of power in the society at large'. Carl Kaysen and Donald F Turner, 'Antitrust Policy: An Economic and Legal Analysis' in E Thomas Sullivan (ed), *The Political Economy of the Sherman Act: The First One Hundred Years* (Oxford University Press 1991).

⁶²¹ Courts are a central aspect of the US antitrust system.

⁶²² However, several other Harvard School scholars tolerated the monopolies that emerged from competition on the merits. For instance, although Carl Kaysen and Donald Turner argued in 1959 for vigorous antitrust enforcement with respect to big firms, the occurrence of competition on the merits (according to their conception of the term) was sufficient to rule out break up remedies. Their proposal for divestiture was restricted to those firms that possessed 'unreasonable market power'. And they accounted that market power was 'reasonable' if it was 'created and maintained, entirely or almost entirely' by 'low prices or superior products attributable to the introduction of new processes, product improvements or marketing methods, or to extraordinary efficiency of a single firm in comparison with that of other firms having a substantial share of market'; or 'ownership of valid patents, lawfully acquired and lawfully used'; or are a result of the circumstances of sectors in which there is a dependency on size in relation to the market. See Carl Kaysen and Donald F Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) 265–269. See also *ibid* 100–119. Around 20 years later Donald Turner would advance a slightly different proposal — see footnote 627.

⁶²³ For instance, in the late 1960s the 'Neal Report', written by a group of lawyers and economists commissioned by president Lyndon Johnson to analyse the state of competition in American industry, suggested that the attorney general should have a mandate to combat oligopolies by ordering divestitures to the point that no corporation would end up with a market share exceeding 12%. See Herbert Hovenkamp, 'Introduction to the Neal Report and the Crisis in Antitrust & a Reprint of the Neal Report' (2009) 5 Competition Policy International. The report was fully reprinted (including their proposal of a draft of a 'Concentrated Industries Act') in Phil C Neal and others, 'Report of the White House Task Force on Antitrust Policy' (1968) 2 Antitrust Law & Economics Review 11. A few years later, senator Philip Hart introduced a bill (Senate Bill 1167) in 1973, making 'it unlawful for any corporation or two or more corporations, whether by agreement or not, to possess monopoly power in any line of commerce in any section of the country or with foreign nations'. US Congress, 'Industrial Reorganization Act Senate Bill, 1167' <<https://www.congress.gov/bill/93rd-congress/senate-bill/1167>> accessed 28 December 2018.

enough to be formalised into legislation and be enforced by the competition authorities and courts. Recently, a ‘New Brandeis Movement’⁶²⁵ has been taking place in the US, claiming for a ‘neo-progressive revival’⁶²⁶ of antitrust enforcement largely based on the Harvard School,⁶²⁷ and the abandoning of consumer welfare as antitrust law’s main goal. This movement, however, is far from hegemonic as of January 2019.

The German competition law model

The other main model of competition law — the German one — also tolerates economic concentration. Yes, it is true that the founding fathers of the Ordoliberal School of thought, centred on the ideas of a group of scholars from the Freiburg University in Germany in the 1930s,⁶²⁸ advocated for a limitation of all economic

⁶²⁴ The efforts mentioned in the footnote above were unsuccessful: the bill did not pass, and courts remained suspicious about divesting a dominant corporation in the absence of an anticompetitive behaviour. Some judicial decisions from that time indeed ruled for the dissolution of a few dominant firms, but all those decisions were based on an anticompetitive conduct practiced by the corporation — see William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' (2000) 14 *Journal of Economic Perspectives* 43. Thus, the unconditional intolerance of some Harvard School scholars towards market power concentration (and their proposal to establish a cap regardless of anticompetitive conduct) was not the hegemonic US model.

⁶²⁵ For an overview, see Lina Khan, 'The New Brandeis Movement: Americas Antimonopoly Debate' (2018) 9 *Journal of European Competition Law & Practice* 131.

⁶²⁶ Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018) 145. For other analysis and proposals that fall under the new Brandeisian movement, see, eg, Teachout and Khan, 'Market Structure and Political Law: A Taxonomy of Power'; and Raghuram Rajan and Luigi Zingales, *Saving Capitalism from the Capitalists: Unleashing the Power of Financial Markets to Create Wealth and Spread Opportunity* (Random House Business Books 2003) 296.

⁶²⁷ In what is perhaps the most popular new Brandeisian proposal up to now, Tim Wu argues that the FTC should have power to break up corporations with monopoly power. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*. Wu makes reference to Phillip Areeda and Donald Turner, who argued in 1978 that substantial and persistent monopolies could be broke down even if they emerged as a result of firms’ ‘superior skills’. Phillip Areeda and Donald F Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol III (Little, Brown and Company 1978) 35–71.

⁶²⁸ The inability of the Weimar Republic’s legal framework to prevent the creation and misuse of economic power influenced the Ordoliberals. For them, private economic power captured the Weimar state. The Ordoliberals argued that the state should impose a rigorous competition policy not only for economic prosperity, but also in order to preserve political institutions and a free society. For discussions about the Ordoliberal movement, see, eg, Angela Wigger, 'Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime' (PhD Thesis in Political Science, Vrije Universiteit 2008) 61–74; David J Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994) 42 *American Journal of Comparative Law* 25; David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting*

concentrations: even of those concentrations derived from competition on the merits.⁶²⁹ However, original Ordoliberalism was ‘far from hegemonic in post-war Germany’, as Hubert Buch-Hansen and Angela Wigger have put it.⁶³⁰ Thus, its influence was only partial. Although some original Ordoliberals indeed tried to introduce a provision granting the monopoly commission the right to deconcentrate large conglomerates in the first German post-war competition legislation, their proposal was shelved without a debate in parliament.⁶³¹ Similarly, Ordoliberal influence on European Union competition law was only partial. To use Wigger’s words, ‘had the founding fathers [of Ordoliberalism] been taken seriously in the aftermath of the War, there would be no large corporations in the Europe of today’.⁶³²

Moreover, it is noteworthy that Ordoliberals changed their opinion about economic concentration: contemporary Ordoliberals tolerate it. While some important founding fathers of the Ordoliberalism, such as Walter Eucken, indeed advocated for the dissolution of corporations that had market power, even if acquired through competition on the merits;⁶³³ contemporary Ordoliberals generally have agreed that ‘where market

Prometheus (Oxford University Press 1998) 232–265; Liza Lovdahl Gormsen, ‘Article 82 EC: Where are we coming from and where are we going to?’ (2006) 2 *The Competition Law Review* 6; Gerhard Schnyder and Mathias M Siems, ‘The Ordoliberal Variety of Neoliberalism’, *Banking Systems in the Crisis: The Faces of Liberal Capitalism* (Routledge 2013); Elias Deutscher and Stavros Makris, ‘Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus’ (2016) 11 *The Competition Law Review* 181.

⁶²⁹ For a comparative analysis of the ideas of the Ordoliberals and the Brandeisian scholars of the Harvard School, see Daniel A Crane, ‘Antitrust and Democracy: A Case Study from German Fascism’ (2018) 18-009 595 *University of Michigan Law & Economics Research Paper*.

⁶³⁰ Hubert Buch-Hansen and Angela Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (Routledge 2011) 36.

⁶³¹ Ibid. For more details, see Wigger, ‘Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime’, 125–127; and Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, 266–280.

⁶³² Wigger, ‘Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime’ 62.

⁶³³ Peter Behrens, *The ‘Consumer Choice’ Paradigm in German Ordoliberalism and its Impact Upon EU Competition Law* (Europa-Kolleg 2014) 16. See also Irene Oswalt-Eucken, ‘Freedom and Economic Power: Neglected Aspects of Walter Eucken’s Work’ (1994) 21 *Journal of Economic Studies* 38 41.

power or even monopoly is the result of success on the market there is no justification to punish it'.⁶³⁴

Some enforcers of the German competition authority (*Bundeskartellamt*) have argued that their model of competition law has always considered consumer welfare as an underlying goal. In a conference of the International Competition Network (ICN) in 2011, officers of the *Bundeskartellamt* have reported that, although the German legislation sets *economic freedom* (meaning both producers' freedom to compete and consumers' freedom to choose between alternative sources of supply⁶³⁵) as the primary goal of competition law, consumer welfare 'has always been an important underlying issue for German competition law' and "plays an important role in Germany's work".⁶³⁶ Along these lines, performance-based competition (*Leistungswettbewerb*) is a core element of the German competition law model, as stated by senior officials of the *Bundeskartellamt* in an article written in 2005,⁶³⁷ meaning that 'where dominant firms used performance-based methods of competition, they should be free to compete, even if their conduct harmed competitors'.⁶³⁸

Thus, it seems safe to say that the *hegemonic version* of the German model of competition law has always tolerated unlimited economic concentration, if derived from the firm's better performance.

⁶³⁴ Behrens, *The 'Consumer Choice' Paradigm in German Ordoliberalism and its Impact Upon EU Competition Law*, 19.

⁶³⁵ Ibid.

⁶³⁶ (ICN) International Competition Network, *Competition Enforcement and Consumer Welfare — Setting the Agenda* (2011) 19.

⁶³⁷ 'A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A "Dialectic" on Competing Approaches'.

⁶³⁸ John Kallaugh and Brian Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25 *European Competition Law Review* 263 270 (as cited in 'A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A "Dialectic" on Competing Approaches').

Conclusion

The hegemonic versions of the main models of competition law operate under a principle that has no place in political competition. My point is that competition law unlimitedly tolerates concentration of economic power derived from organic growth (that is, competition on the merits). More specifically: both *hegemonic versions* of the American and German models of competition law have allowed unlimited economic concentrations as long as this is a result of the firm's better performance. I take as 'hegemonic' the ideas formalised into legislation and mostly enforced by competition authorities and courts.

Since 1994 (when Brazil first started to have a *de facto* competition law), Brazilian legislation and its enforcement have been basically based on the hegemonic versions of the US and German (European) models and there was no relevant innovation with respect to the tolerance of economic concentration.⁶³⁹

I think it is rather difficult for the Rawlsian or Schumpeterian conceptions of democracy to allow such an unlimited toleration of concentration of political resources (even that resulting from competition on the merits) that exists in economic competition law, as this could harm the *appearance of free formation of public opinion* and, consequently, the *appearance of integrity of elections*. Therefore, regulation of political competition needs its own principles because, in politics, there should be caps to the resources to compete.

⁶³⁹ See, eg, Calixto Salomão Filho, *Direito Concorrencial* (Malheiros Editores 2013) and Paula Forgioni, *Os Fundamentos do Antitruste* (6 edn, Editora Revista dos Tribunais 2013).

7.3.4. The principles of a regulation of the economic resources to compete in politics

In politics, no voice, or group of voices, should monopolise the forum of political deliberation. As put by Justice Bastarache J, from the Canadian Supreme Court, while delivering the opinion of the majority in *Harper v Canada (AG)*,

If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out [...]. Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote.⁶⁴⁰

Indeed, freedom of political expression implies that the discourse will be in fact heard. For how free is speech that cannot be heard?⁶⁴¹ But, of course, there should be 'no restrictions on the content of speech',⁶⁴² so that regulations 'favor no political doctrine over any other'.⁶⁴³

In this regard, the regulation proposed here has three dimensions: (i) the regulation of *typical economic power* with respect to political donations and

⁶⁴⁰ at para 72.

⁶⁴¹ Fiss, *The Irony of Free Speech*.

⁶⁴² Rawls, 'The Basic Liberties and their Priority' 73.

⁶⁴³ Ibid.

expenditures; (ii) the regulation of the structure of the *media*; and (iii) the regulation of competition between *political parties*. The first two relate to the equality of opportunity for ‘non-candidate’ citizens. And the last one relates to the equality of opportunity for parties and their candidates.

Each of those dimensions should have a guiding principle — even from a Rawlsian perspective of democracy, it does not seem reasonable to adopt a complete intolerance of concentration in the media sector and in the competition between political parties, as will be discussed in the coming chapters.

Thus, when it turns to the traditional media, the foremost principle should be to work to establish, as far as possible, that media corporations have *no more than 30% of the audience* in their markets.

The regulation of political parties, in turn, should assure that *no* party or electoral coalition should have *more than 30% of the economic resources* used to compete, that is, financial resources and access to the media.

The idea that underlies those principles is that no one, or no group, should have a predominant influence on the formation of public opinion. The above-mentioned parameters (that is, 30% of the relevant resources) are proper from a Rawlsian conception of democracy, but they may be open to discussion: for those who hold a Schumpeterian conception of democracy, 50% of the relevant resources would be a more suitable limit.

However, the proposal advanced here is less compatible with the Schumpeterian perspective when it comes to the regulation of typical economic power. Under a Rawlsian perspective of democracy, the regulation should aim that concentrations in the economic sphere *do not concentrate the donations or expenditures* in the political sphere. In my view, legislation framed to implement this principle could be an efficient

way to prevent the appearance of political finance corruption. As we have seen in chapters three, five and six, Brazil has had a legal framework that has allowed concentration of political donations, and, as a consequence, it permitted the occurrence of not only dependence and war chest corruption, but also the use of ‘on books’ political donations as a platform for *quid pro quo* corruption schemes — such as the one concerning the construction cartel and Petrobras, and the scheme that helped JBS in the series of acquisitions that turned the company the world’s largest meat producer.

Brazil recently faced political finance reforms, but the legal framework still permits economic concentration to be transformed into concentrations of political donations: current campaign finance legislation still enables owners of large companies to donate a significant amount of money. And this means not only an open channel to dependence and war chest corruption, but also that the legislation still has a loophole that enables businessmen to practice *quid pro quo* corruption in the terms done by JBS and the construction cartel. The next chapter will argue that introducing legislation to control the concentration of political donations and expenditures could be an effective way to prevent dependence, war chest and *quid pro quo* corruption.

The tools to implement the above-mentioned principles can be separated into two types. As Fiss explains, the state can *increase* the voices — ‘handout megaphones’ — of those who might otherwise not be heard in the public space; and the state can *restrict* the voices that dominate the political discourse so that others may be heard as well.⁶⁴⁴ Thus, regulation should basically use mechanisms to enhance the weaker voices and impose limits on the louder ones.

⁶⁴⁴ Fiss, *The Irony of Free Speech*, 4.

7.3.5. The temporal extent

Elections are fundamental to any representative democracy. In Brazil, their importance is established in article 1 of the Constitution, which says that ‘*all power emanates from the people, who exercise it by means of elected representatives or directly*’.⁶⁴⁵ It is through elections that the people choose to whom they delegate their power, so that the elected representatives legislate and govern for the people.

Elections are fundamentally made of *speech*. Political parties and their candidates talk and write about their policy proposals, voters discuss them, and so forth. As elections are fundamentally made of speech, regulation of speech in elections is imperative (taking into account the terms of the Brazilian Constitution that have been advanced in this chapter).

Nonetheless, political speech occurs at all times in a democracy. Although political speech takes place especially during elections, there is also political deliberation in non-electoral periods.

Therefore, the regulation of political competition should mainly focus on elections, due to its key importance for representative democracy, but it should also take place during non-electoral periods.

There is no doubt that this temporal delimitation is aligned with a Rawlsian conception of democracy. Yet it is debatable if it would be compatible with the Schumpeterian perspective, since it has been famously been linked with the restrictive view of democracy being the right that people have to *periodically* ‘choose and authorize governments to act on their behalf’.⁶⁴⁶ Nevertheless, one could make the case

⁶⁴⁵ Sole paragraph (emphasis added). Constituição da República Federativa do Brasil, 1988.

⁶⁴⁶ Held, *Models of Democracy*, 142.

that, in order to be able to choose the political elites who will govern them, citizens need to be exposed to a minimally balanced political deliberation at *all times*.

7.3.6. The limitations

As we have seen earlier, the purpose of the present regulation (under a Rawlsian conception of democracy) is to insulate the political process from economic inequalities, so that these economic inequalities do not affect citizen and candidate equality of opportunity in political deliberation.

However, this does not mean that the regulation will deliver *complete* insulation of the political process from the influence of economic power, as I have also mentioned previously.

Firstly, in a capitalist society, corporations and businessmen will have an unequal influence on government, whatever insulation tool we use. As argued by Lindblom, corporations have a privileged position in capitalist societies (see section 1.2). This is an important limitation that my regulation does not address.

In this way, an important limitation of my proposal is that it does not give a solution to the political power organically enjoyed by ‘too-big-to-fail’ firms. Even if these companies do not make political donations, governments will depend on their good performance because their failure will have an impact on the national economy due to the thousands of jobs they generate (directly and indirectly), tax revenues, and so on. Along these lines, not only government but also society, in general, may place great attention on what those massive companies have to say. Therefore, too big to fail firms may have a preferential voice in the forum of political deliberation because of the ‘content’ of their speech and this is a problem that transcends the regulation I am

proposing. That is, the strength in the discourse of these too big to fail companies is not necessarily linked to the inequality of *opportunity* to speak.⁶⁴⁷

Similarly, this proposal does not address the assumption that *economic concentrations tend to generate political influence*, or even further, that *economic concentrations tend to generate political concentrations*, as the founding fathers of Ordoliberalism and some Brandeisian scholars of the Harvard School have argued.⁶⁴⁸ How that translation would actually work is a controversial and complex issue, which requires a detailed analysis that would exceed the strict word limit that this thesis is bounded by. Moreover, this problem is firstly concerned with the organisation of economic competition — the concern with the organisation of the political sphere is merely a corollary — and the discussion of how the economy should be organised is beyond the scope of this thesis.

Another limitation of my proposal is that it does not address socioeconomic inequalities.⁶⁴⁹ There is a consensus that capitalism leads to socioeconomic inequalities. Although it is beyond the scope of this thesis to examine the justifications of a capitalist economic system, we need to acknowledge that inequalities exist and will perhaps always exist as long as we adopt this economic system. A certain degree of socioeconomic inequality will exist even if we adopt egalitarian economic policies for capitalism suggested by progressive economists, such as the ones famously advanced by Thomas Piketty.⁶⁵⁰ In this regard, significant inequalities in education may affect how

⁶⁴⁷ The exception to this rule is the media sector because, the larger a media company is, the greater is its opportunity to speak — but this is addressed by the regulation proposed here.

⁶⁴⁸ For discussions on that theoretical assumption within the scholarship of both schools, see Crane, 'Antitrust and Democracy: A Case Study from German Fascism' and Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, 53–58. For a discussion about that assumption within the Ordoliberal School, see Deutscher and Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus'.

⁶⁴⁹ As pointed out in footnote 234, Brazil is the 14th most unequal country in the world in terms of Gini index.

⁶⁵⁰ Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2017).

well individuals are able to rationally ‘develop informed political views, and to transform those views into political influence’ on society.⁶⁵¹

That said, since the Constitution establishes a capitalist economic system (article 1, item IV; article 170) and simultaneously establishes that the law should protect the normality and legitimacy of elections against the influence of economic power (article 14 paragraph 9), we should think about laws that may help to advance equality of opportunity within the political sphere, even if it will not deliver total insulation from economic inequalities.

I acknowledge that perhaps the reform of political finance does not totally prevent people’s distrust in democracy. Firms will always have a privileged voice in capitalist society. But it is an attempt (in my view, a valid one) to diminish this influence and improve people’s trust, even if this attempt does not totally exhaust the problem.

Lastly, I must point out that the regulation advanced here does not embrace lobbying. As mentioned in chapter five, Brazil does not have legislation that regulates lobbying activities. There is a lack of data regarding the practice. Therefore, a first step would be the introduction of legislation in order to regulate lobbying, making it transparent. The discussion of regulation concerned with the *concentration of lobbying spending* would be the second step, after data is generated and made accessible.

7.3.7. The regulatory bodies

Perhaps one of the most persuasive assumptions held by those who argue for libertarian views is that corporate power counterbalances state power. As famously argued by Justice Antonin Scalia of the Supreme Court of the United States: by lowering

⁶⁵¹ Brighouse, 'Political Equality and the Funding of Political Speech' 494.

the voice of private economic power in political deliberation, we ‘augment the always dominant power of government’.⁶⁵²

That is why the Brazilian egalitarian model of electoral regulation imposes the protection of public opinion formation from *both* the state and private economic power. Protection from private economic power has been extensively discussed throughout this thesis, but it must be pointed out that Brazilian legislation also protects the formation of public opinion from the influence of the state — for instance, the Elections Act establishes a series of prohibitions for public agents during elections (article 73).⁶⁵³

That said, whenever discussing the regulation of political competition, we should have in mind the risks of potential political power misuse. In this way, to avoid such risks, perhaps it is reasonable to adopt an independent and dispersed regulation.

The enforcement of political finance legislation is already independent to a significant degree: the electoral courts, which are part of the judiciary, have the authority to enforce it in the Brazilian framework.⁶⁵⁴

The problem seems to be larger with respect to the regulation of the media: there is no body with authority to regulate the media in Brazil. Thus, it might be reasonable to create an independent agency, similar to the one proposed by Alexandre Faraco,⁶⁵⁵ with authority to regulate the sector (that is, television, radio, the internet, and the press). An independent agency seems sensible, to prevent the misuse of media regulation against those who are not favourites of the government. For instance, we should avoid the partisan use of subsidies — when a given government grants subsidies only to media

⁶⁵² *Austin v Michigan Chamber of Commerce*, 494 US 652, 110 S Ct 1391.

⁶⁵³ See also section 9.2

⁶⁵⁴ Brazil’s judiciary has specialized electoral courts established by the Constitution of 1988 (articles 118–121).

⁶⁵⁵ Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet*, 195. Faraco rightly points out that no independent government agency is completely independent. For instance, see chapter six in this thesis for a discussion about the democratic control on Cade.

entities that are aligned with their ideology or use subsidies to undermine media corporations' independence.⁶⁵⁶ The agency should have the final say in the administrative arena.⁶⁵⁷ Since judicial review is a right established by the Brazilian Constitution (article 5 item XXXV), any decision of the agency could be potentially reviewed by the judiciary. Due to the sensitive nature of media regulation, perhaps closer supervision and/or involvement of judicial bodies with a reputation for independence and integrity, such as the Supreme Court and the Superior Electoral Court, could be discussed.

Finally, another feature that may help to avoid the misuse of political finance and media regulation by those who hold political offices (for self-benefit or to benefit its supporters, such as a television channel or newspaper) is the adoption of *rules that are as objective as possible*. An example of a highly prescriptive rule is the one setting a cap, such as the one stating that more than 30% of the audience in a media market represents a 'predominant influence on public opinion'.

⁶⁵⁶ However, Rowbottom argues that is questionable if there is any evidence of state funds being used to undermine media independence in stable liberal democracies. See Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 197.

⁶⁵⁷ Perhaps the structure could be partially inspired by the German media concentration regulatory body (*Kommission zur Ermittlung der Konzentration im Medienbereich — KEK*), which was established in 1996 to secure the plurality of opinion in nationally-transmitted private television and prevent dominant influence on public opinion. KEK also has a transparency function — they have to provide an annual list of TV-services and their shareholders and publish every three years a detailed report on the state of media concentration and on measures to secure diversity of opinion in the private broadcasting sector, taking into account horizontal, cross-media and international concentration. KEK is composed of six experts in media and economic law, who are responsible for analysing mergers and acquisitions, and examine television licences before they are granted. See Peter Humphreys, 'Transferable Media Pluralism Policies from Europe', *Media Power and Plurality* (Springer 2015) 163.

7.4. Conclusion of the chapter

Both political finance and media regulation deal with the same object: the forum of political deliberation. In other words, they both directly impact the formation of public opinion.

In this fashion, I have argued that they should regulate the concentration of political speech in order to enable a free formation of public opinion.

By adopting a Rawlsian interpretation of the Brazilian Constitution, I have argued that there should be no concentrations of *private money in politics*; no concentration of *media resources*; and no concentration of *parties' and candidates' economic resources to compete*. While promoting equality of opportunity (which helps to prevent the appearance of war chest corruption), the regulation proposed here also simultaneously work to ensure that an elected politician's attitude has not been impacted by the influence of private economic resources (which helps to prevent the appearance of *quid pro quo* and dependence corruption). To put it differently, it is a regulation that aims to protect the appearance of electoral integrity (and, consequently, its legitimacy and normality) in the sense that public opinion has been apparently freely formed, in order to encourage people's trust in the democratic integrity of capitalist democracy.

However, even if we assume a Rawlsian perspective of democracy, it does not seem reasonable to adopt a complete intolerance of concentration in the media sector and in the competition between political parties, as will be discussed in the following chapters. Therefore, the principle in those arenas should be that no one, or no group, should have resources that allow a *predominant influence on public opinion*.

Chapter Eight

The regulation of non-candidate citizens and their groups

8.1. Introduction

Hermann Heller once argued that political power struggled to distance itself from religious power after the Middle Ages; but since the beginning of the 20th century that struggle has been in relation to economic power.⁶⁵⁸

The existence of that struggle (and importance of overcoming it) was assimilated by the Brazilian Constitution of 1988, which establishes that law shall protect the normality and legitimacy of elections against the influence of economic power.

In the last chapter, I discussed the theoretical foundations of a Rawlsian interpretation of the above-mentioned constitutional provision and have proposed a paradigm for regulation: to control concentrations of political speech to enable the free formation of public opinion.

This chapter will advance the implications of that paradigm for the regulation of political competition between *non-candidate* citizens and their groups.

There are two main ways by which the wealth of non-candidate actors may influence the forum of political deliberation: by making a political donation or expenditure; or by having access to media resources. Therefore, this chapter is organised

⁶⁵⁸ Hermann Heller, *Political Power*, *Gesammelte Schriften* (2 ed, J. C. B. Mohr, 1992. V 3) 39 (as cited in Gilberto Berkovici, 'A Influência do Poder Econômico sobre o Poder Político' (2015) 274 IBCCRIM 8 9).

into two main sections: section 8.2 discusses the ‘typical’ economic power; and section 8.3 analyses the media.

8.2. The regulation of the typical economic power

In this section, I will first argue that the concentration of political donations and expenditures might be a gateway for the occurrence of the three types of political finance corruption (*quid pro quo*, dependence and war chest). I will then propose a regulation to control the concentration of political spending.

8.2.1. The occurrence of *quid pro quo*, dependence and war chest corruption

As we have seen (particularly in chapter three), dependence and war chest corruption have apparently occurred in Brazil and still might occur.

Equally disturbing is the fact that some of the largest Brazilian corporations were part of *quid pro quo* corruption schemes, in which their *economic concentration* related to their *concentration of political donations*.

The JBS case is perhaps the foremost example. From 2007 to 2011, JBS acquired several companies and eventually became the world’s largest meat producer. Such concentration was supported by the federal state-owned Brazilian Development Bank (mostly known as BNDES⁶⁵⁹), who handed out R\$ 8.1 billion (around £1.7 billion) in subsidised credits to JBS.⁶⁶⁰ And, in exchange for BNDES’ support, the controller of

⁶⁵⁹ Acronym in Portuguese for *Banco Nacional de Desenvolvimento Econômico e Social*.

⁶⁶⁰ See *Reuters*, ‘Brazil police probe BNDES loans to JBS, police say’ (12 May 2017) <<http://www.reuters.com/article/brazil-corruption-jbs-sa/brazil-police-probe-bndes-loans-to-jbs-police-say-idUSE6N1H102N>> accessed 3 November 2017.

JBS made political donations to the parties that formed the coalition government.⁶⁶¹ To put it another way, JBS' acquisitions were financially supported by governmental subsidies and, in exchange, JBS agreed to make subsequent political contributions to the coalition government, as declared by the controller of the firm (Mr Joesley Batista) in a leniency deal.

Consequently, JBS not only became the world's largest meat producer, but also became Brazil's top political donor in the 2014 elections. Between the 2010 and the 2014 elections, JBS increased its political donations from R\$ 83 million (around £19.47 million) to R\$ 357.37 million (around £83.85 million).⁶⁶² That is, the firm donated 330% more.

Another leading example of the phenomenon of simultaneous economic concentration and concentration of political donations, through a *quid pro quo* scheme, is the cartel of construction corporations.⁶⁶³ The cartel made donations to the politicians and parties that formed the governing coalition, as part of a corruption scheme between the construction companies and Brazil's national oil company, Petrobras. To make the cartel workable, construction companies corrupted not only high-ranking employees of Petrobras⁶⁶⁴ but also the politicians that gave political support for the appointment and

⁶⁶¹ MPF (Ministério Público Federal), Pré-acordo de colaboração premiada, Srs Joesley Batista, Wesley Batista e Ricardo Saud <<https://d2f17dr7ourrh3.cloudfront.net/wp-content/uploads/2017/05/ALERTA-JOTA.INFO-Leia-o-pr%C3%A9-acordo-de-dela%C3%A7%C3%A3o-de-Joesley-Batista.pdf>> accessed 3 November 2017, fls 67.

⁶⁶² David Friedlander, 'Maior doador de campanhas concentra repasses a governistas' *Folha de S. Paulo* (21 September 2014) <<http://www1.folha.uol.com.br/poder/2014/09/1519452-maior-doador-de-campanhas-concentra-repasses-a-governistas.shtml>> accessed 3 November 2017; *O Estado de S. Paulo*, 'Siga o dinheiro: quem doou quanto para quem (2014)' <<http://estadaodados.com/doacoes2014/#.Wc6RJGiPKUk>> accessed 3 November 2017.

⁶⁶³ The construction cartel was a form of economic concentration because it enabled its members to maintain their dominance in the sector, harming the emergence of smaller companies and blocking entrants.

⁶⁶⁴ They were responsible for the public bids for hiring engineering services, construction services and onshore industrial assembling held by Petrobras.

permanence of these employees.⁶⁶⁵ For each (overpriced) contract, construction companies paid 2 or 3% of the contract value to Petrobras employees and politicians.⁶⁶⁶ Due to the amount of money that circulated (at least £2.2 billion⁶⁶⁷), some have wondered if the scheme has been so far the ‘biggest corruption scandal in history’⁶⁶⁸ (see subsection 6.4.4 for more details about the case).⁶⁶⁹

It should be noted that bribes in the form of political donations made by JBS and the construction cartel were frequently made on the books. In other words, although the political donations had a legal appearance, their motivation was illegal.

One could argue that the law could simply ban donations from companies and businessmen that have contracts with the state. However, implementing such a ban does not prevent *the rent-seeking that interests all kind of corporations and businessmen*, such as the ones regarding tax, competition law, and so forth.

The loose control of the concentration of political donations might be an open door for corruption, be it dependent, war chest or *quid pro quo*. And the numbers on the concentration of political donations in Brazil are impressive. JBS was responsible for around 8% of the total money used in the 2014 elections (which includes elections for the Presidency, Senate and Chamber of Deputies, in the federal arena, and the

⁶⁶⁵ Justiça Federal, 13ª Vara da subseção Judiciária de Curitiba, Sentença, Ação Penal nº 5036528-23.2015.4.04.7000/PR, parágrafo 399 <<https://www.conjur.com.br/dl/sentenca-odebrecht-lava-jato.pdf>> accessed 3 November 2017.

⁶⁶⁶ Ibid, parágrafo 1028.

⁶⁶⁷ Ernesto Londoño, ‘Brazil Shuts Down Successful Corruption-Fighting Task Force’ *The New York Times* (21 July 2017) <<https://www.nytimes.com/2017/07/07/world/americas/brazil-corruption-lava-jato.html>> accessed 3 November 2017.

⁶⁶⁸ Jonathan Watts, ‘Operation Car Wash: Is this the biggest corruption scandal in history?’ *The Guardian*.

⁶⁶⁹ The symbiotic relationship between the construction cartel and the ruling political elites somewhat resembles the relationship between the cartel industries and the rise of the National Socialist party in Germany. I am obviously referring to its *operationality*; and not the *content* of the government’s policies. For the German experience, see, eg, Crane, ‘Antitrust and Democracy: A Case Study from German Fascism’.

Government and Legislative Assembly, in the state arena).⁶⁷⁰ More than 1/3 (34.5%, to be precise) of the politicians elected to the Chamber of Deputies in 2014 received donations from JBS.⁶⁷¹

The concentration of political donations has occurred also in contexts that did not involve *quid pro quo* practices. Many large corporations were big donors but were not involved in *quid pro quo* schemes (as of February 2019). For instance, Bradesco, one of the largest Brazilian banks, funded 22.07% of the politicians elected for the Chamber of Deputies in 2014;⁶⁷² Vale, the largest mining company, funded 16.6% of the deputies;⁶⁷³ and so forth. As we have seen throughout this thesis, this might not be a *quid pro quo* issue, but it may be a problem of the appearance of dependence and war chest corruption.

And, as we have seen in chapter three, although the Supreme Court has banned corporate donations in 2015 (*ADI 4650*), the current political finance legislation still enables wealthy individuals to donate a significant amount of money. As such, the legislation enables the concentration of political donations.

Perhaps a way to help to prevent the occurrence of those *quid pro quo*, dependence and war chest corruption is to implement a tight control on the concentrations of political donations and third-party expenditures, which will be discussed in the next subsection.

⁶⁷⁰ *O Estado de S. Paulo*, ‘Siga o dinheiro: quem doou quanto para quem (2014)’.

⁶⁷¹ Marco Aurélio Ruediger and others, *Câmara Transparente* (FGV DAPP 2017).

⁶⁷² José Roberto de Toledo, Lucas de Abreu Maia and Rodrigo Burgarelli, ‘As 10 empresas que mais doaram em 2014 ajudam a eleger 70% da Câmara’ *O Estado de S. Paulo* (3 November 2014) <<http://politica.estadao.com.br/noticias/geral,as-10-empresas-que-mais-doaram-em-2014-ajudam-a-eleger-70-da-camara,1589802>> accessed 3 November 2017.

⁶⁷³ *Ibid.*

8.2.2. The control of the concentration of political donations and third-party expenditures

If we take a Rawlsian perspective of democracy, there could be a twofold solution. The first step would be to implement vouchers.⁶⁷⁴ Or alternatively implement a tight control on the use of private money by setting uniform low caps for individuals' donations and expenditures.⁶⁷⁵ These strategies aim to *equalise the opportunity to speak in the forum of political deliberation*, by avoiding turning non-candidate citizens' economic inequalities into inequalities in the political sphere.⁶⁷⁶

Nevertheless, by implementing campaign vouchers or low caps to individuals' donations/expenditures, we may still face the *bundling problem*. Therefore, the second step would be to introduce legislation to avoid such a risk: bundling practices should be banned.

⁶⁷⁴ Richard Hasen's proposal would put 'public financing directly in the hands of voters'. Vouchers would give the same amount of money (say \$100) to each voter. All other sources of campaign money (ie, private contributions, third-party expenditures, and use of own private resources) would be prohibited. Richard L Hasen, 'Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers' (1996) *California Law Review* 1 22; Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*, 89.

⁶⁷⁵ The problem with this alternative is that it might diminish the opportunity of the lower classes to participate in politics vis-à-vis the vouchers alternative.

⁶⁷⁶ Ron Levy and Graeme Orr rightly point out that, by limiting third-party expenses, we might end up raising the voice of political parties. See Levy and Orr, *Law of Deliberative Democracy*, 128–135. In my view, we might also eventually raise the voice of those citizens who are linked to media resources — for instance, media owners. This is indeed a problem. There will be either a system more focused on the protection of *inter-inequality*: the inequality *between* actors (ie, political parties/candidates, media owners, and those citizens who donate or expend); such as the one advanced by Levy and Orr. Or a regulation more aimed to protect the *intra-inequality*: the inequality *within* those actors (eg, an inequality between those citizens who want to donate or expend); such as the one advanced in this chapter. Perhaps the trade-off will depend on the country's context. Levy and Orr opt for a model intended to protect inter-inequality, but they mainly seem to have in mind developed English-speaking countries (eg, Australia, Canada, New Zealand, United Kingdom, and the United States), which have a quite lower level of economic inequality vis-à-vis the Brazilian one. In Brazil, where high levels of economic inequality and poverty exist, a model that does not aim to protect *intra* political inequality might be less justifiable. Another contextual issue that should be considered is that, in some of those English-speaking countries trade unions traditionally make donations to parties (eg, UK) or independent expenditures (eg, Australia). In Brazil, there are no such traditions. And, by adopting loose limits for third-party expenditures, there is a considerable risk that business will overflow the independent expenditures arena, as they overwhelmingly dominated the political donations arena from 1994 until 2014 (see chapters three and five). Finally, another thing that might have also to be considered during the trade-off is the emergence of social medias, where third-parties can divulge their positions to other people without making any expenditure.

However, bundling might be subtle. For instance, the CEO of a corporation might only ‘suggest’ a vote for a candidate; or even infer, when communicating with the employees, that a future political scenario with a given candidate in office would be better for the firm’s business. Thus, even if we ban lobbyists from being involved in fundraising and bundling,⁶⁷⁷ there is a risk that companies and economic groups may incentivise their shareholders and employees to donate homogeneously. For instance, Grupo Pão de Açúcar, Brazil’s largest supermarket corporation, has 151 thousand employees in the country.⁶⁷⁸ Say 100 thousand of these workers accept the company’s (subtle) suggestion to donate their vouchers to a given presidential candidate. If we set the voucher at R\$ 100 (around £23.40), Pão de Açúcar’s donation would be around R\$ 1 million (around £234,310), which would certainly be relevant to political competition. Perhaps we could call this phenomenon ‘soft bundling’.⁶⁷⁹ Nowadays, soft bundling does not seem a very common practice because today the caps for the use of private money are quite loose, but it could rise after the evolution of the legislation in the terms I have proposed. Therefore, we do not have enough information to provide a more precise analysis of what could be characterised as soft bundling and if it should be allowed or not.⁶⁸⁰

⁶⁷⁷ Hasen suggested this framework to the US. Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*, 102.

⁶⁷⁸ Luísa Melo, 'Por dentro do Grupo Pão de Açúcar, maior varejista do país' *Revista Exame* (13 September 2016) <<https://exame.abril.com.br/negocios/por-dentro-do-grupo-pao-de-acucar-maior-varejista-do-pais/>> accessed 29 May 2017.

⁶⁷⁹ In Brazil, there are reports of businessmen trying to persuade employees to vote for a certain candidate. See, eg, *Revista Exame*, 'MPT processa dono da Havan por “coagir” funcionários a votar em Bolsonaro' (3 October 2018) <<https://exame.abril.com.br/negocios/mpt-processa-dono-da-havan-por-coagir-funcionarios-a-votar-em-bolsonaro/>> accessed 11 January 2019. Moreover, some American CEOs have reportedly communicated their political preferences to employees and ‘although the letters may not, according to law, intimidate the employees, they can strongly communicate a preference and list reasons justifying it’ — Teachout and Khan, 'Market Structure and Political Law: A Taxonomy of Power' 51. There are subtle ways to influence employers’ political preferences. For example, the letter above mentioned may be sent after a rise in the employees’ salaries or distribution of bonus.

⁶⁸⁰ For instance, what is the difference between soft bundling and the legitimate manifestation of an opinion? If the CEO of a corporation only implies, in corporate communication, that a future political scenario with a given candidate in office would be better for the company’s business, should that be

The regulation of the concentration of political influence proposed in this section is certainly aligned with the Rawlsian conception of democracy. But it seems less aligned with a Schumpeterian one, since this perspective is less concerned with the translation of economic inequalities into politics.

8.3. The regulation of the media

Besides those who donate or make an expenditure, non-candidate citizens who own or have access to media resources also have greater opportunity to influence political discussions because the media has a privileged position in the forum of political deliberation. The media is distinct from all other economic sectors due to its vital role in democracy: (i) media corporations hold the government to account and expose its abuses of power; (ii) they maintain an informed citizenry; and (iii) they divulge ideas.⁶⁸¹ Its importance to democracy has been recognised not only by justices of the Brazilian Supreme Court,⁶⁸² but also by many courts around the world.⁶⁸³ In this respect, even some Brazilian antitrust commissioners reported that they felt being pressured by the media while deciding some cases.⁶⁸⁴

In this section, I will propose a regulation of political competition with respect to the media, based on the citizens' equality of opportunity. Firstly, I will briefly set a

banned? We should also not confuse soft bundling with the natural alignment between people who view society from a similar perspective, as often people working together might have. After each election, the Superior Electoral Court could publish a detailed report on the state of the concentration of political donations (and possibly third-party expenditures), analysing the donations from a 'group' perspective, ie, analysing the individual political donations grouped together according to the professional and social conditions of the citizens (corporations where they work, trade unions, and so on). The more data we have on the soft bundling phenomenon and the natural alignment between people with similar views, the more knowledge we will have about the convenience of regulating the practice.

⁶⁸¹ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 174.

⁶⁸² See, eg, Justice Joaquim Barbosa's opinion in STF, ADI 4650/DF.

⁶⁸³ See, eg, the US Supreme Court in *Buckley v Valeo*, 19, 26; and the European Court of Human Rights in *Centro Europa 7 S.R.L. and Di Stefano v Italy* [GC], no 38433/09, ECHR 2012.

⁶⁸⁴ Anonymous former commissioners 1, 3 and 5.

theoretical background for media power and freedom of the press, in order to make explicit the assumptions upon which this proposal rests. Subsequently, I will explain the distinction made by the Constitution between broadcast and other types of media, and argue that television is the most influential media vehicle in the country. Next, I will claim that existing legislation is helpful but not enough: granting access to broadcast media and regulating its conduct are insufficient to satisfactorily equalise the opportunity to compete in the political arena, which may only be achieved by implementing measures to assure the plurality of ownership and diversity of content in the media sector. Finally, I will then discuss a media regulation based on plurality of ownership and diversity of content.

8.3.1. Theoretical background

There are two controversial topics when it comes to the media: (i) the extent to which the media, and media owners in particular, can influence public opinion; and (ii) the extent of the media's freedom of speech. In this subsection, I will explain the libertarian and egalitarian views with respect to these topics and try to establish a synthesis that will ground the section.

The discussion about the media owners' power to influence public opinion

There are two competing views when it comes to the media owners' power to influence public opinion. The libertarian claims that a media owner cannot afford to publish only content with which he personally agrees. He must publish content that will

generate a satisfactory return to his investment.⁶⁸⁵ Under the libertarian view, the public sphere works like a commercial market: opinions and news' perspectives float around freely and compete through the laws of supply and demand for the scarce resource of audience attention.⁶⁸⁶

By contrast, the egalitarian argues that mass media owners are not neutral actors who coordinate the demand and supply of opinions in the forum of political deliberation, but are rather partial people that have the power to shape political and social realities.⁶⁸⁷

I agree with Jacob Rowbottom that, in reality, those two perspectives co-exist, at least to a certain extent.⁶⁸⁸

Firstly, the media owner can intervene in media content where such intervention will not turn away audiences who are valuable to advertisers, or where the changes caused by the intervention gain as many viewers as it loses.⁶⁸⁹

If the market is concentrated, the audience may not have anywhere else to turn. For example, if a given newspaper "is the only left-of-centre title, its readers have less scope to punish the owner's interventions where there is no alternative in that market".⁶⁹⁰ Therefore, while the audience may not approve of the owner's actions, it may still read the newspaper because of a lack of other feasible alternatives.⁶⁹¹

⁶⁸⁵ Copp, 'Capitalism versus Democracy: The Marketing of Votes and the Marketing of Political Power' 96.

⁶⁸⁶ Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America: Whose Voice Gets on the Air?*, 21.

⁶⁸⁷ Ibid 22.

⁶⁸⁸ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 184. Rowbottom draws the first five conclusions that I use in this subsection.

⁶⁸⁹ C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press 2007) 92.

⁶⁹⁰ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 184.

⁶⁹¹ Ibid. This may be the case for the national market for Brazilian broadsheet newspapers. Progressive people may read the moderate conservative Folha de S. Paulo only because it is more moderate than the other two largest Brazilian newspapers, the conservative O Globo and O Estado de

Moreover, because the mainstream media corporations are usually ones that have greater financial resources to invest, they usually have high-quality coverage of non-political subjects, such as culture, sports, and so on. So, people might watch the television or buy the paper to access entertainment⁶⁹² and then read or watch the news as a consequence. For example, many people who watch Globo TV's high-quality soap operas (that are on air both before and after its main news program) may end up watching Globo TV's news.

Therefore, even if media firms are constrained by market forces to respond to consumers and/or advertisers in relation to some content, media owners still hold much discretion over political content.⁶⁹³ In other words, they have considerable discretion to decide what should or should not be news; selecting, interpreting, and creating news.⁶⁹⁴ Along these lines, they can give emphasis to a fact or opinion,⁶⁹⁵ or refuse to publish certain facts or opinions.⁶⁹⁶

Perhaps a less disputable question is whether the media impacts the audience. I assume that it does. If one is informed only by certain perspectives, it is likely that these perspectives will influence one's views on the facts. However, media corporations'

São Paulo (I am grounding this argument on the newspapers' political alignment demonstrated in João Feres Júnior and others, 'A (in)clemente Mídia das Eleições.' (2014) XVII Insight Inteligência 46). The rest of the newspapers may have a different level of investment capacity, which impacts the quality of the content. Thus, readers seeking high-quality national coverage of Brazilian politics may be 'trapped'. And, considering the audience that these large corporations have, perhaps few advertisers will stop advertising because they disagree with a given editorial line. They want their advertisements to have the largest impact possible.

⁶⁹² Copp, 'Capitalism versus Democracy: The Marketing of Votes and the Marketing of Political Power', 96.

⁶⁹³ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 185.

⁶⁹⁴ Sartori, *Elementos de Teoría Política*, 155.

⁶⁹⁵ For instance, Azevedo argues that the Brazilian media had a leading role in president Fernando Collor's impeachment in 1991, by mobilizing public opinion and putting impeachment on the agenda. Fernando Antônio Azevedo, 'Eleições Presidenciais, Clivagem de Classe e Declínio da Grande Imprensa' (2011) *Revista USP* 84 107.

⁶⁹⁶ For example, in 1987, Globo TV, the largest Brazilian television channel, reportedly refused to transmit a landmark rally organised by the opposition in 1987, requesting open elections for the Presidency of the Republic. Instead, Fábio Comparato reports, that day the television channel preferred to transmit trifling news, such as the tricks used by an American Indian to sell coloured chicks; conversations a girl had with dolphins in the United States; and so forth. Comparato, 'Tocando no Ponto Nevralgico: A Democratização da Informação e da Comunicação Social' 140.

power to influence elections is not absolute — in 2006, the Workers' Party candidate, Lula, won the elections despite arguably strong opposition from the mainstream media⁶⁹⁷ (maybe this was only possible because the Workers' Party coalition had significant access to broadcast, as assured by the legislation,⁶⁹⁸ and Lula was the presidential candidate who received the largest amount of corporate donations).⁶⁹⁹ Along these lines, although media corporations seem to play an *important role* in shaping the audience's view, it seems too crude to suggest that the audience is *totally passive* to what media corporations publish.⁷⁰⁰

That said, considering that (i) mass media corporations reach thousands and frequently millions of people and their political coverage has an impact on the audience; and (ii) media owners have a significant discretion to guide the political coverage of their corporations; I assume that *media owners have an immense (but not absolute) power to shape public opinion*.

The extent of the media's freedom of speech

When it comes to the extent of the media's freedom of speech, the libertarian view is the one adopted by the mainstream media in Brazil. In short, the typical

⁶⁹⁷ Azevedo, 'Eleições Presidenciais, Clivagem de Classe e Declínio da Grande Imprensa'. See also Venício Artur de Lima, *Jornais mais ideológicos e partidarizados* (Observatório da Imprensa 2010).

⁶⁹⁸ Gabriel Mestieri, 'PT passa o PSDB pela 1ª vez em tempo de TV, mas liderança no horário eleitoral não garante vitória' *R7* (5 August 2010) <<http://noticias.r7.com/brasil/noticias/com-dilma-pt-tera-tempo-de-tv-maior-que-concorrentes-pela-1-vez-na-historia-20100801.html>> accessed 3 November 2017.

⁶⁹⁹ *Último Segundo*, 'Confira os maiores doadores de Lula e Alckmin na eleição' *Clicknews* (29 November 2006) <<https://www.clickpb.com.br/politica/confira-os-maiores-doadores-de-lula-e-alckmin-na-eleicao-11074.html>> accessed 3 November 2017. Azevedo argues that the Workers' Party won the 2006 and 2010 presidential elections because their government was delivering economic growth, which, according to him, would corroborate Lewis-Beck's argument that good economic performance keeps the ruling party in office — Azevedo, 'Eleições Presidenciais, Clivagem de Classe e Declínio da Grande Imprensa', making reference to Michael S Lewis-Beck, *Economics and Elections: The Major Western Democracies* (University of Michigan Press 1990). Perhaps all these factors (access to broadcast, large funding and economic context) were relevant.

⁷⁰⁰ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 184.

argument is that communication is a private matter and any form of regulation is interpreted as a form of censorship and a violation of freedom of speech.⁷⁰¹ Therefore, freedom of the press is taken as a synonym for freedom of expression.

The mainstream media frequently illustrate their libertarian view with the argument that “the best control is the citizens’ remote control”. To put it differently, the state should not interfere with the citizens’ remote control. This argument is similar to the libertarian one on political finance in the sense that the state does not have legitimacy to regulate the flow of information and that society will be better off without state interference.⁷⁰²

However, the Brazilian Supreme Court has recently ruled that, when it comes to politics, freedom of speech needs to serve the enlargement of public debate, informing citizens with different policy proposals.⁷⁰³ As a consequence, in my view, *the coverage of politics by the media should be plural and diverse, as well as the circulation of political ideas and opinions.*

Freedom of speech is still key, of course, and needs to be respected: there should be no censorship of content, as ruled by the Supreme Court.⁷⁰⁴ But, when it comes to politics, the laws that structure the media should be designed so as to foster plural and diverse political deliberation, under the egalitarian model of electoral regulation, either from the Rawlsian or Schumpeterian conceptions of democracy.

⁷⁰¹ Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America: Whose Voice Gets on the Air?*, 173.

⁷⁰² See subsection 7.2.1.

⁷⁰³ As argued by Justice Fux, while delivering the leading vote of the majority in STF, ADI 4650/DF, *Inteiro Teor do Acórdão* 50.

⁷⁰⁴ STF, ADI 4451 MC, Rel Min Ayres Britto, DJ 13/09/2010; STF, ADI 4451, Rel Min Alexandre de Moraes, DJ 06/03/2018.

8.3.2. The constitutional distinction between broadcast and other media

The Brazilian Constitution makes a distinction between broadcast and other media. Unlike all other media, broadcast media is considered a public utility by the Constitution and therefore the Federal Government of Brazil has exclusive power to operate it, either directly or through authorisation, concession or permission.⁷⁰⁵ A possible justification for this distinction is that, unlike other media, broadcast depends on a scarce natural resource: the radio frequency spectrum.⁷⁰⁶ The transmission of information through airwaves requires occupying an area of the spectrum band, which is finite. This calls for the organisation, selection and supervision of who will occupy it.⁷⁰⁷ And the Constitution has granted this duty to the state.

Being a constitutional public utility, free-of-charge access to radio and television are granted to political parties (article 17 paras 3). In addition, infra-constitutional legislation forbids paid political advertising in broadcast both during electoral and non-electoral periods, and broadcasters must act with due impartiality during elections.⁷⁰⁸

This legal framework is adequate also because television is historically the media with the greatest impact on the formation of public opinion in the country.

⁷⁰⁵ Article 21 item XII.

⁷⁰⁶ BBC, 'The Spectrum and Its Uses: A simple guide to the radio spectrum' (2006) <<http://downloads.bbc.co.uk/rd/pubs/spectrum/bbc-the-spectrum-and-its-uses.pdf>> accessed 4 November 2017.

⁷⁰⁷ Ivar A M Hartmann, 'Liberdade de Manifestação Política e Campanhas: É Preciso Atenção aos Algoritmos' in Joaquim Falcão (ed), *Reforma Eleitoral no Brasil: Legislação, Democracia e Internet em Debate* (Civilização Brasileira 2015) 156.

⁷⁰⁸ The Brazilian framework is similar to the one in the United Kingdom in this aspect. British privately-owned broadcasters (and the publicly owned Channel 4) are required to provide fair access (Office of Communications Broadcasting Code, 27); paid political advertising is forbidden (Communications Act 2003, s319 (2) (g) and 321(2)); and free time is given to political parties for party and election broadcasts (Communications Act 2003 s333 and Office of Communications Broadcasting Code, 27). See Andrew Geddis, 'The Press: The Media and The 'Rupert Murdoch Problem'' in Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (Routledge 2012). The BBC, although governed by another legal framework, also must obey similar rules on impartiality and fair access.

The greater impact of broadcast television on public opinion

Often referred as the ‘country of television’, Brazil has had a high television viewership in comparison to other mass media sources, by international standards,⁷⁰⁹ as mentioned in chapter two. In a comprehensive poll about the habits of media consumption of the Brazilian population requested by the government in 2016, 63% of the Brazilian citizens said that *television* is their main source of information, while only 26% said it was the internet, 7% said that it was the radio and 3% mentioned the press.⁷¹⁰ To put it another way, the impact of the television was at least twice that of the internet.⁷¹¹ When asked about their *top two* main sources of information, television was mentioned by 89%, while the internet was mentioned by 49%.

Nonetheless, the victory of Bolsonaro in the 2018 election for the Presidency led some hurriedly conclude that television is not that relevant anymore. Their main argument was that Jair Bolsonaro’s coalition had derisory free airtime in the broadcasts during the first round and won the election despite that. For those analysts, Bolsonaro’s victory could be largely explained by his great performance in social media, particularly on WhatsApp, where arguably fake news was spread in his favour.

There are two problems with that argument. First, it ignores a key circumstance of the election: Bolsonaro was seriously stabbed while campaigning, which put his life in danger.⁷¹² Because of that unprecedented fact in the Brazilian presidential elections,

⁷⁰⁹ Ames, Baker and Rennó, ‘The Quality of Elections in Brazil: Policy, Performance, Pageantry, or Pork?’ 112.

⁷¹⁰ Presidência da República, Secretaria de Comunicação Social, ‘Relatório Final Pesquisa Brasileira de Mídia — PBM 2016’, 14.

⁷¹¹ The numbers mentioned above refer mostly to free-to-air television. Around 27% of the population have premium television but very few mentioned it as their top source of information. Presidência da República, Secretaria de Comunicação Social, ‘Relatório Final Pesquisa Brasileira de Mídia — PBM 2016’.

⁷¹² Dom Phillips, ‘Jair Bolsonaro stabbing: knife attack plunges Brazil's election into disarray’ *The Guardian*. Ernesto Londoño and Shasta Darlington, ‘Jair Bolsonaro, Presidential Candidate in Brazil, Is Stabbed’ *The New York Times*.

he received vast *favourable coverage from television channels* from the day of the attack to the day of the first round of the election.⁷¹³ The news essentially reported that the attack threatened his life and updates about his recovery were constantly given. Because he was constantly exposed to television, and in a favourable way, the knife attack served as an immensely effective political advertisement. Thus, due to the knife attack, Bolsonaro managed to overcome the above-mentioned weakness of his campaign, that is, low free airtime in broadcast in the first round. Moreover, Bolsonaro received large free airtime in broadcast in the second round, as granted by the legislation, so he did not have that competitive disadvantage when the election was in its final phase. Another factor that is overlooked by those analysts who have professed the ‘death’ of television is that Bolsonaro apparently had the support of the second largest⁷¹⁴ television corporation in Brazil, Record TV.⁷¹⁵

Secondly, data on the impact of WhatsApp are mixed, to say the least. In a statistical survey conducted during the first round of the presidential election, only 11% of the voters said they *often* consumed information in WhatsApp to find out more about the presidential candidates, such as campaign proposals or information in general. By contrast, the top two sources of information mentioned by voters were related to television: 35% said they *often* watched TV news programs and 28% said they *often*

⁷¹³ See Laboratory on Media and the Public Sphere (LEMEP) of the Rio de Janeiro State University (UERJ), (*Manchetômetro*) <<http://www.manchetometro.com.br/>> accessed 31 January 2019; searching data about the Globo TV’s news program *Jornal Nacional* between 06 September (the day of the attack) and 06 October (the day before the first-round election). The coverage from *Folha de S. Paulo*, the most popular broadsheet journal, also had a similar pattern, with Bolsonaro having more than three times as many positive mentions as other candidates. *Folha de S. Paulo*, ‘Críticas a Bolsonaro e a Haddad têm as mesmas proporções na Folha’ (12 October 2018) <<https://www1.folha.uol.com.br/poder/2018/10/criticas-a-bolsonaro-e-a-haddad-tem-as-mesmas-proporcoes-na-folha.shtml>> accessed 3 November 2018.

⁷¹⁴ In terms of cumulative audience reach (ie, percentage of people impacted by) of the corporation’s main news program. Kantar Ibope Media, ‘Dados de audiência nas 15 praças regulares com base no ranking consolidado — 22/10 a 28/10’ <<https://www.kantaribopemedia.com/dados-de-audiencia-nas-15-pracas-regulares-com-base-no-ranking-consolidado-2210-a-2810/>> accessed 31 January 2019.

⁷¹⁵ As mentioned in chapter two, two events were apparently crucial to Bolsonaro’s victory: the Car Wash Operation (and other similar *quid pro quo* corruption scandals) and the knife attack. The traditional mainstream media heavily covered those two events in a way that eventually enhanced Bolsonaro’s quality as a candidate.

watched parties' free airtime in television.⁷¹⁶ Along these lines, some have pointed out that Fernando Haddad was only able to jump from 4% in August to 22% of vote intentions in October because he used the extensive Workers' Party free airtime in television.⁷¹⁷

Likewise, data do not seem to fully support the argument that fake news⁷¹⁸ spread through WhatsApp overwhelmingly impacted public opinion. Only 23% of voters said they received WhatsApp content with criticism or attacks on presidential candidates the week before the first round. And only 6% of voters said that the content they received through WhatsApp helped them in the process of choosing the candidate to vote for.⁷¹⁹

Actually, there is a question of how much people trust the content they consume in social media. An online opinion poll commissioned in 2018 by the Reuters Institute for the Study of Journalism of the University of Oxford found that Brazilian internet users have almost two times more trust in news overall (59%), than in news consumed

⁷¹⁶ Datafolha, 'Programa jornalístico de tv é a principal fonte de informação sobre os candidatos a presidente' (11 September 2018) <<http://media.folha.uol.com.br/datafolha/2018/09/12/f57e60bb0d259d2f9084d4f3ff460465mi.pdf>> accessed 31 January 2019.

⁷¹⁷ *O Estado de S. Paulo*, 'Pesquisas Eleitorais' <<https://politica.estadao.com.br/eleicoes/2018/pesquisas-eleitorais/primeiro-turno/presidente/ibope>> accessed 31 January 2019.

⁷¹⁸ 'Fake news' are 'false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke'. 'fake news' (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/fake-news>> accessed 31 January 2019. Fake news is part of the post-truth phenomenon, that is, 'circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief', which has recently emerged to a certain extent. See 'post-truth' (*OED Online*, OUP) <<http://www.oed.com/view/Entry/58609044?redirectedFrom=post-truth#eid>> accessed 6 November 2017.

⁷¹⁹ *GI*, '73% dizem que não receberam conteúdo no WhatsApp com críticas ou ataques a candidatos na semana antes do 1º turno, diz Ibope' (24 October 2018) <<https://g1.globo.com/politica/eleicoes/2018/eleicao-em-numeros/noticia/2018/10/24/73-dizem-que-nao-receberam-conteudo-no-whatsapp-com-criticas-ou-ataques-a-candidatos-na-semana-antes-do-1o-turno-diz-ibope.ghtml>> accessed 3 February 2019. As of February 2019, empirical evidence on the impact of fake news is mixed, to say the least, also in the United States. See, eg, Andrew Guess, Brendan Nyhan and Jason Reifler, 'Selective Exposure to Misinformation: Evidence from the Consumption of Fake News During the 2016 US Presidential Campaign' (2018) *European Research Council*; and Nir Grinberg and others, 'Fake News on Twitter during the 2016 U.S. Presidential Election' (2019) 363 *Science* 374.

through social media (32%).⁷²⁰ This finding is aligned with the results of the already mentioned comprehensive poll requested by the Brazilian government in 2016, which found that most Brazilians always or often trust the information they get from television, radio and newspapers (54%, 57% and 59%, respectively); while only a minority always or often trust the information they get from the internet (20% always or often trust the information they get from websites, 11% from blogs, and 14% from social media).⁷²¹

Therefore, that indicates that news and arguments within the internet in general, and social media in particular, are more reliable if they were originally produced or reported by the traditional media. If the event or argument does not appear in one of the traditional media organisations, it ends up being seen as a less important event/argument (or not even an event/argument at all) by some people. As argued by Copp,

If certain opinions are not discussed seriously in the major media, they may not be taken seriously by most voters who, because they have limited time to research political matters, accept the implicit verdict of the media as to what range of ideas is worth serious attention.⁷²²

Thus, I have a sceptical view of the internet (and social media in particular),⁷²³ in the sense that the public debate that takes place in it is largely constrained by the traditional media (who produce what is seen by most people as the creditable news).⁷²⁴

⁷²⁰ Nic Newman and others, *Reuters Institute Digital News Report 2018* (2018).

⁷²¹ Presidência da República, Secretaria de Comunicação Social, 'Relatório Final Pesquisa Brasileira de Mídia — PBM 2016', 28.

⁷²² Copp, 'Capitalism versus Democracy: The Marketing of Votes and the Marketing of Political Power', 96.

⁷²³ For a good summary of the different views on the internet, see Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 216.

Along these lines, it seems that people still heavily rely on the journalistic protocol. Actually, the slightest suspicion that some people were relying on ‘news’ produced without the journalistic protocol caused a sort of hysteria among members of the establishment, civil organisations, academics, and even in micro-social circles, such as groups of friends and families. In this fashion, it is symbolic that, for many (perhaps most) people, the remedy for fake news is to check the source. That is, check if the content was produced by the mainstream traditional media. To put it differently, for many, the solution to the immature use of new technology (that is, social media and messaging apps) is the strengthening of the role of traditional journalistic media. For example, the Digital, Culture, Media and Sport Committee appointed by the House of Commons in the UK, in its final report on Disinformation and ‘Fake News’, concluded that ‘social media users need online tools to help them distinguish between *quality journalism*, and stories coming from organisations that have been linked to disinformation or are regarded as being unreliable sources’.⁷²⁵

To summarise, no doubt social media changed the dynamics of the flow of communication to a certain extent: (i) platforms, such as Facebook and Twitter, enable easy direct communication between politicians and voters (making easier to communicate without the mediation of the traditional media or public funding); and (ii) these same platforms, along with WhatsApp, encourage communication between citizens (making it easier, for instance, to organise protests, deliberate and spread

⁷²⁴ The news website UOL (owned by Folha, the largest Brazilian newspaper) is the third website with most access in Brazil, after Google and Facebook, which are websites that do not produce news, only distribute them. See *Olhar Digital*, ‘Saiba quais são os sites mais acessados do Brasil’ (17 February 2014) <<https://olhardigital.com.br/pro/noticia/saiba-quais-sao-os-sites-mais-acessados-do-brasil/40352>> accessed 3 November 2017. It should be highlighted, however, that *largely* does not mean *totally*. Without a doubt, the internet has the merit of giving voices to new sources and voices.

⁷²⁵ Digital, Culture, Media and Sport Committee, Disinformation and ‘fake news’: Final Report (HC 2017-19, 1791) (emphasis added). The committee also recommended the Government to ‘put pressure on social media companies to publicise any instances of disinformation’ (paragraph 272). This could be extended to foreign influence; although, when looking to the Brazilian context, there are no reports of significant foreign influence in political campaigns as of February 2019.

rumours). Nonetheless, their limitations should not be overlooked: we must not overestimate their impact on public opinion. Firstly, as of February 2019, there is not enough data to safely claim that the internet has a greater *reach* than television as a media platform (in other words, that more people use the internet to consume political information than watch television). Secondly, the debate within the internet is largely constrained by the extent to which people trust the information and, as such, it is largely constrained by the content produced by the traditional media.

Therefore, it seems that television is still the media with the largest impact on public opinion in Brazil with respect to the extent of its reach; followed by the internet, which continues to grow steadily. And, although the radio and the press have smaller audiences, they have an impact on the debate that takes place on the internet, because many believe that the traditional mainstream media is a trusted gatekeeper of the news and arguments that are worthy of debate.

8.3.3. The limitations of the electoral legislation on the media

The regulation of broadcast during elections

As we saw in chapter three and earlier in this chapter, legislation provides parties with free airtime in broadcasts during elections (while any paid political advertising is forbidden in broadcasts). There is no doubt this is sound policy.⁷²⁶

Nonetheless, media corporations may still *promote or block* an issue, viewpoint or speaker, while covering politics.⁷²⁷ This is why the Elections Act regulates

⁷²⁶ See *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21.

⁷²⁷ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 178.

broadcaster *conduct*, to guarantee impartiality.⁷²⁸ Considering that Brazil's broadcasting is essentially performed by private corporations (as seen in chapter two), this regulation seems crucial.

Starting about three months before the election day, broadcasters are prohibited from giving privileged treatment to a candidate, party or coalition.⁷²⁹

But does that work in practice? Although it may have helped in moderating the intensity of the bias,⁷³⁰ its limitation must be noted. Some bias remains. Data from the Laboratory of Media Studies and Public Sphere (LEMEP) of the State University of Rio de Janeiro⁷³¹ shows that, during the presidential election of 2014, the most watched news program in the country (Globo TV's *Jornal Nacional*) made unequal coverage of the two main candidates and their political parties:

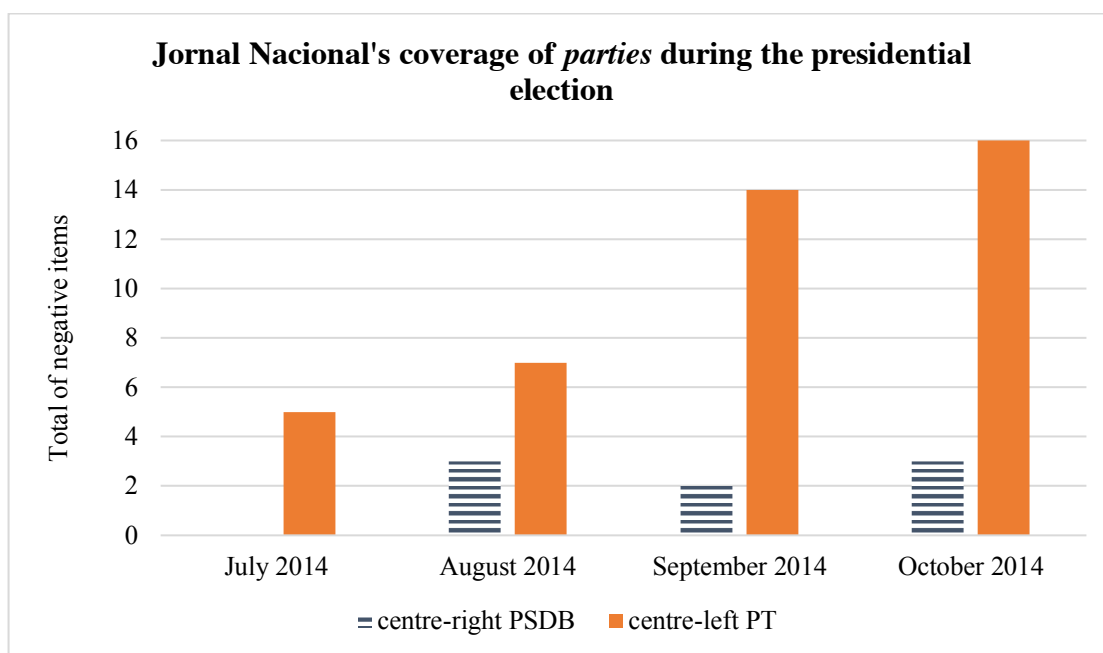
⁷²⁸ Articles 8 and 45.

⁷²⁹ Article 45 item IV. According to the opinion of Justice Ayres Britto, followed by the majority of the Supreme Court in 2010, radio and television broadcasters may transmit opinions or journalistically criticise the candidates/parties but they cannot, as a media corporation, clearly support, or repudiate, one of the candidates/parties of the elections. The decision of what can be interpreted as *clearly supporting or repudiating one of the candidates/parties* should be made *a posteriori* by the judiciary. STF, ADI 4451. It should be noted that the Elections Act forbids specific acts, such as: the transmission of programs presented or commented by a pre-candidate (article 45, paras 1); the transmission of programs that have a name which relates to a candidate chosen by convention, even if pre-existing, even if it coincides with the name of the candidate or with the nominal variation adopted by him (article 45 item VI); the transmission of images of popular consultation and polls in which it is possible to identify the interviewee (article 45, item I); and broadcast or divulge films, soap operas, series or any other program with an allusion or critique to a candidate or political party, even if it is concealed, except for journalistic programs or political debates (article 45 item V). Formerly, the legislation also established that broadcasters were prohibited from disseminating opinions favourable or contrary to any candidate, party, coalition, its organs or representatives (article 45 item III, final part); and from using montage or other audio or video technique that in any way degrades or ridicules candidate, party or coalition, or produces or sells a program for that purpose (article 45 item II). However, in 2010, the majority of the Supreme Court approved an injunction granted by Justice Ayres Britto suspending these two norms because they violated the constitutional rights to free speech, freedom of the press and information. In 2018, the Court confirmed the unconstitutionality of these two norms. See STF, ADI 4451. For a discussion about the case, see Osório, *Direito Eleitoral e Liberdade de Expressão*, 274.

⁷³⁰ See Azevedo, 'Mídia e Democracia no Brasil: Relações entre o Sistema de Mídia e o Sistema Político' 108.

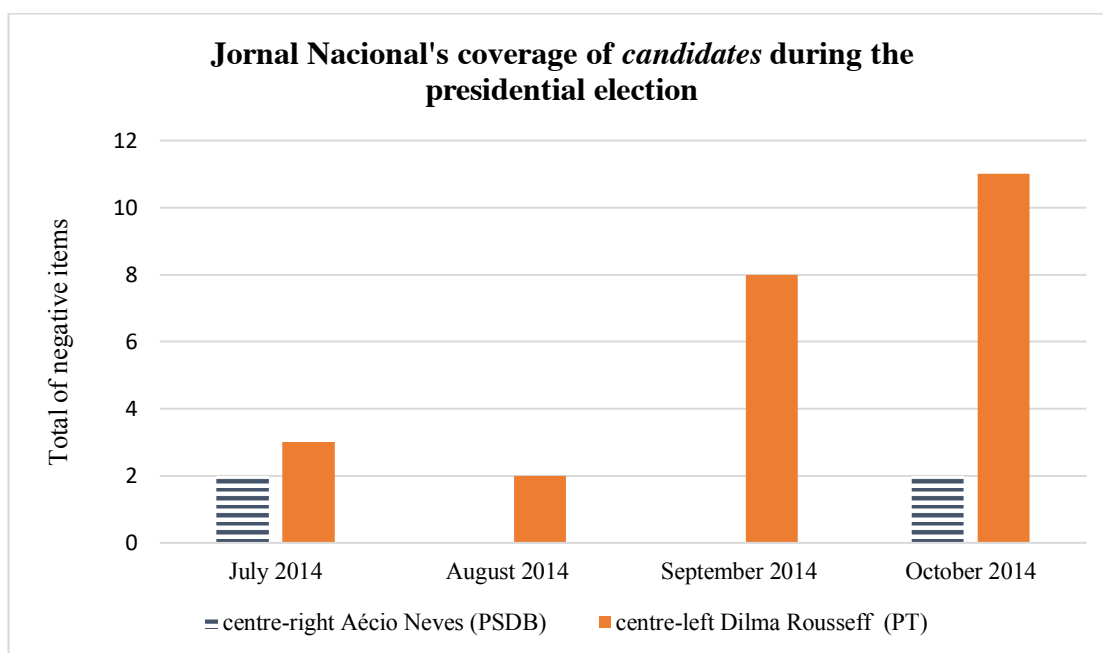
⁷³¹ Laboratory on Media and the Public Sphere (LEMEP) of the Rio de Janeiro State University (UERJ).

Figure 8.1



Source: LEMEP

Figure 8.2



Source: LEMEP

Obs.: In 2014, broadcasters were forced to follow the rules as of July 1. The presidential election ran until the end of October.

Therefore, even with impartiality rules, there was an apparent imbalance in the *Jornal Nacional* coverage: the centre-left PT (Workers' Party) and its candidate received more negative coverage in comparison with the coverage of the main opposition party, the centre-right PSDB (Brazilian Social Democracy Party) and its candidate.

The regulation of broadcasts during non-electoral periods

Broadcasters can also influence democratic deliberation during non-electoral periods. And the Brazilian legislation lacks *any impartiality rules with respect to non-electoral periods*.

Consequently, this has enabled *Jornal Nacional* to exercise its watchdog function with inconsistency, at least according to the LEMEP data. After May 2016, when the centre-left Dilma Rousseff⁷³² stepped aside and the conservative Michel Temer⁷³³ took office, the news program diminished the intensity of its government criticism. While the second Rousseff administration had an average of 98 negative items per month, Temer's Administration had an average of 40 negative items per month.⁷³⁴

Unlike Brazil, there are countries, such as the United Kingdom and New Zealand, which require broadcasters to act impartially at all times.⁷³⁵

However, their regulations also have limitations. I will take the United Kingdom as an example. British commercial broadcasters must obey specific regulation about *political or industrial issues on which politicians, industry and/or the media are in*

⁷³² From the PT (Workers' Party).

⁷³³ From the MDB (Brazilian Democratic Movement party).

⁷³⁴ Laboratory on Media and the Public Sphere (LEMEP) of the Rio de Janeiro State University (UERJ). The last month of the Temer Administration analysed was October 2017, when I concluded the research for this chapter.

⁷³⁵ Geddis, 'The Press: The Media and The 'Rupert Murdoch Problem'' 141.

debate.⁷³⁶ And on matters relating to *current public policy*, the broadcaster's views and opinions must be excluded from programmes⁷³⁷, and due impartiality 'must be preserved on the part of any person providing a service'.⁷³⁸

Nonetheless, the British media authority — Ofcom (Office of Communications Broadcasting) — concedes that these regulations have important limitations. Ofcom admits that the Broadcasting Code allows them 'to consider complaints about impartiality or accuracy in relation to specific programmes' but does *not* allow an analysis of 'the overarching approach of a channel, for example, *the specific news stories that it covers or its tone*'.⁷³⁹

Hence, British commercial broadcasters still have considerable space to shape a lot of the news coverage: which stories may be prioritised (which stories make the headlines or the order in which stories are presented);⁷⁴⁰ the whole selection of content itself (the selection or omission of news);⁷⁴¹ the tone and level of depth of coverage (a channel could become more partisan by sensationalising news stories and could more

⁷³⁶ Office of Communications Broadcasting Code, 28.

⁷³⁷ Ibid, 5.4.

⁷³⁸ Ibid, 5.5. On such matters of political or industrial controversy, and current public policy, 'an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes' (p 30). While news presenters and reporters in news programmes are forbidden from expressing their views and opinions (item 5.4), 'presenters of personal view or authored programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy', as long as 'alternative viewpoints are adequately represented either in the programme, or in a series of programmes taken as a whole', and presenters do not 'use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality' (p 29). During elections, 'due weight must be given to the coverage of larger parties' and 'broadcasters must also consider giving appropriate coverage to other parties and independent candidates with significant views and perspectives' (item 6.2) — the Code then sets some rules to help to achieve these objectives.

⁷³⁹ Ofcom, *Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox, Inc* (Office of Communications 2017), 9.11 (emphasis added).

⁷⁴⁰ Ibid 85.

⁷⁴¹ Ibid 85. In this regard, Rowbottom observes that there is a problem on the account of which political or industrial issues are in debate. Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 209.

deeply investigate certain issues);⁷⁴² and the selection of speakers⁷⁴³ (the speaker of a given cause may be less articulate than the speaker for its competing cause). The Broadcasting Code does not cover those forms of impartiality.

According to Ofcom, regulating such editorial discretion would raise serious concerns about freedom of speech.⁷⁴⁴

Returning to Brazil, free speech is quite a sensitive topic for the country: until 1985, Brazil faced an authoritarian regime that implemented censorship.⁷⁴⁵ Thus, enacting legislation introducing far-reaching impartiality obligations is likely to face understandable resistance.

It is true that Brazilian legislation can be improved in some points without damaging free speech: the legislation can be extended to non-electoral periods; become more detailed by learning from the British experience; and require broadcasters to be transparent regarding the criteria they have used to select news.⁷⁴⁶ But, in any event, impartiality obligations will always be limited due to the protection of free speech.

To summarise, I understand that the Brazilian impartiality obligations seem to be insufficient to satisfactorily guarantee the democratic function of broadcasters because: (i) at the moment they are limited to the conduct of broadcasts during elections; and (ii) even if we extend them to non-electoral periods and even if we introduce a more detailed legislation harmless to free speech to help to increase broadcaster impartiality,

⁷⁴² Ofcom, *Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox, Inc*, 9.11. See also Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 209.

⁷⁴³ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 209.

⁷⁴⁴ Ofcom, *Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox, Inc*, 85.

⁷⁴⁵ See, eg, Gláucio Ary Dillon Soares, 'A Censura durante o Regime Autoritário' (1989) 4 *Revista Brasileira de Ciências Sociais* 21. A new Constitution was promulgated in 1967, in order to legalise the authoritarian state. That Carta created conditions to the promulgation of future legislation that established censorship in the country. During the 20th century, there was also censorship during Vargas's authoritarian state (1937–1945). See Lilia Moritz Schwarcz and Heloisa Murgel Starling, *Brasil: Uma Biografia* (Companhia das Letras 2015) 376.

⁷⁴⁶ Perhaps broadcasters should be more transparent about what criteria they have used. And the criteria should be open to debate and modified in case their application is found to exclude any speaker. Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 210.

impartiality obligations will not be sufficient because there will always be some discretion afforded to broadcasters⁷⁴⁷ due to the protection of free speech.

The regulation of the internet and the press during elections

The Elections Act forbids any type of paid advertisement on the internet. However, it allows boosting of content⁷⁴⁸ (article 57-C), as long as there is disclosure to users that the dissemination of that content was paid for. Legislation should be continuously updated to nurture healthy political deliberation on the internet. It should, for example, ensure that all political messages on social media carry information about who produced them; and it should be a criminal offence to fail to identify the source of the message. Moreover, legislation should ensure that social media robots do not disfigure political deliberation online— a possible remedy is to require social media companies to implement security certificates, to ensure that a real person is behind the views expressed on the account.

And, while the legislation does not grant parties free access to the press, it permits candidates to pay at their own expenses for the publication of up to ten electoral advertisements, per newspaper or magazine, at different dates (article 43).⁷⁴⁹ However, as observed by Aline Osório, there are no restrictions in relation to the *number* of

⁷⁴⁷ The limited effectiveness of impartiality rules raises even more concern if we note that several congressmen own broadcast affiliate and/or retransmission stations (violating a constitutional ban, as we have seen in subsection 2.6.3). By being an owner of a television or radio station, the candidate has a greater opportunity to influence the formation of public opinion in his constituency vis-à-vis a candidate that is not. See footnote 135. See also Osório, *Direito Eleitoral e Liberdade de Expressão*, 318.

⁷⁴⁸ Boosting of content occurs when there is a payment to internet platforms, such as Google, Facebook, Twitter LinkedIn or WhatsApp, for them to boost a given content in order to reach people that would not normally be reached. See, also, Resolução nº 23551, de 18 de dezembro de 2017, do Tribunal Superior Eleitoral, publicada no DJE-TSE, nº 26, de 5/2/2018, p 248–273, e DJE-TSE, nº 94, de 14/5/2018, 98–124.

⁷⁴⁹ The maximum space, by edition, is 1/8 of the page of the broadsheet newspaper and 1/4 of the page of the magazine or tabloid.

newspapers and magazines.⁷⁵⁰ For instance, a candidate may publish ten electoral advertisements in the top ten Brazilian newspapers and magazines, totalising 100 advertisements.

Therefore, the amount of money a party (and their candidates) has, impacts the volume of their voice on the internet (through the impulse of content) and in the press (through electoral advertisements), not mentioning the quality of their speech (that is, the quality of the video, audios, texts and images published). This shows the importance of regulating the equality of opportunity between parties and their candidates, which will be addressed in the next chapter.

Lastly, it should be highlighted that there are no impartiality obligations within the press, or for contents produced exclusively for the internet. Thus, non-broadcasters have *full freedom to support a party or a candidate*.

8.3.4. A proposal of measures to ensure plurality and diversity

So far, I have argued that the legislation regarding access to broadcast and impartiality of broadcasters during elections is not (and will never be) sufficient to preclude media corporations' influence over the democratic debate. We have also seen that the electoral regulation of the internet and press are quite loose.

As a corollary, in this subsection I will argue that the state should also implement measures to ensure plurality and diversity: a 'negative' one, by controlling media ownership concentration, in order to avoid concentrations that will harm the forum of political deliberation; and a 'positive' one, by stimulating the creation and existence of alternative media corporations through subsidies, in order to enhance the

⁷⁵⁰ Osório, *Direito Eleitoral e Liberdade de Expressão*, 332–333.

media's plurality of ownership and diversity of content. Brazil currently lacks any kind of media regulation in those terms.

The difference between the manifestation of the media's economic power in relevant markets and on public opinion

In the media sector, a company's power to impact public opinion may be quite independent of its market power. For example, if the largest local newspaper in Michigan buys the largest local newspaper in Florida, the antitrust authority may find that the acquisition will not result in anticompetitive effects since the newspapers operate in different relevant markets. The antitrust analysis will ignore, thus, that the acquisition may increase the corporation's power over public opinion within the broader national public sphere.⁷⁵¹ If one media group owns the largest local newspapers of all the state capitals of the US, the relevant markets may not overlap, but the owner's capacity to influence a presidential election would be evident.

Therefore, antitrust law has a limitation with respect to the media. Even if we apply the strictest antitrust enforcement (within the boundaries of the hegemonic versions of the antitrust models discussed in subsection 7.3.3), there could still be certain antidemocratic mergers and acquisitions that would be cleared. This is because the hegemonic versions of the main antitrust models are not concerned with the media's power to influence the formation of public opinion generally.

⁷⁵¹ Baker, *Media Concentration and Democracy: Why Ownership Matters*, 14.

The criterion of impact on public opinion

The importance of the media to democracy is recognised by the Brazilian Constitution: in my view (a Rawlsian one), its text imposes a twofold control of media concentrations. Firstly, so far as the *economic aspects* are concerned, the Constitution 1988 sets that ‘social communication media may not, directly or indirectly, be subject to monopoly or oligopoly’ (article 220 paragraph 5). Therefore, when it comes to broadcast, antitrust enforcement must observe this constitutional provision.⁷⁵²

However, the *economic aspects* of media markets are beyond the scope of this thesis. What concerns this thesis is that the Constitution goes further and imposes a *second step*: a regulation of the media that goes beyond mere economic aspects.

As we have seen, article 14 paragraph 9 establishes that the law should protect elections from the influence of economic power, as far as possible, according to a Rawlsian interpretation of the constitutional text. Media companies are unquestionably a form of economic power.⁷⁵³ Not only is the media an economic power, but it is, by far, *the one that most directly influences elections*.

Considering that typical electoral regulation (that is, granting access to broadcast and regulating broadcasters’ conduct, and regulating advertisements in other forms of media) *are not enough to satisfactorily insulate elections from the influence of media’s economic power*; it follows that a regulation of the media’s structure is inescapable. This

⁷⁵² For André Fernandes, article 220 paragraph 5 of the Constitution infers that the regulation of media ownership should be based on pluralism rather than efficiency. See André de Godoy Fernandes, ‘Meios de Comunicação Social no Brasil: Promoção do Pluralismo, Direito Concorrencial e Regulação’ (Tese de Doutorado em Direito, Universidade de São Paulo 2009). Alexandre Faraco has a similar view. Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet*. I respectfully disagree. In my view, since article 220 paragraph 5 refers to *economic concepts* (ie, monopoly and oligopoly), it is referring to *economic aspects* of the media market. It is, in other words, implementing an economic limit on the concentration of the media market. In my view, it is the article 14 paragraph 9 of the Constitution which imposes a further step, transcending the economic analysis by demanding the democratic distribution of media resources and the adoption of the impact on public opinion as the proper paradigm for media regulation.

⁷⁵³ As mentioned in footnote 4, I take economic power as a synonym for wealth power, that is, the power that derives from the private ownership of financial resources, or other forms of private assets.

is the only way we can respect the Constitution's text, which expresses the intention to avoid, as far as possible, the influence of economic power in elections. To put it differently, by reading the Constitution's text under a Rawlsian perspective of democracy, the media sector should be structured in a way to diminish the influence of its economic power over elections.

In this way, regulation of the media's structure should be considered part of the egalitarian electoral regulation established by the Constitution. Assuming an egalitarian electoral regulation grounded on the Rawlsian principle that individuals should have equal opportunity to speak and be heard,⁷⁵⁴ media ownership should ideally be the most dispersed possible. Thus, media regulation could be based on C. Edwin Baker's *principle of democratic media distribution*. That is, 'democracy implies as wide as practical a dispersal of power within public discourse', which leads to requiring the maximum dispersal of media ownership.⁷⁵⁵

It should be remembered that regulation of the forum of political deliberation, which has the media as a pillar, is not concerned with the provision of commodities to consumers and prices.⁷⁵⁶ It is rather concerned with non-commodified values, such as democratic distribution⁷⁵⁷ and power to impact public opinion.⁷⁵⁸ And the democratic distribution principle is an end in itself, and not a means aimed to lead empirically to

⁷⁵⁴ See subsection 7.2.4.

⁷⁵⁵ Baker, *Media Concentration and Democracy: Why Ownership Matters*, 7.

⁷⁵⁶ Therefore, my regulation of the political debate is different from Stucke and Grunes' proposal of a marketplace of ideas for the media, which is concerned with the diverse provision of commodities to consumers — Maurice E Stucke and Allen P Grunes, 'Antitrust and the Marketplace of Ideas' (2001) 69 *Antitrust Law Journal* 249. One limitation of Stucke and Grunes' model is that it does not seem to take into account the impact of regional market power in the broader national public sphere, as described by the example above.

⁷⁵⁷ Baker, *Media Concentration and Democracy: Why Ownership Matters*, 74.

⁷⁵⁸ *Ibid* 272.

some desirable result.⁷⁵⁹ In this regard, ‘normative appeal, not empirical evidence, provides its justification’.⁷⁶⁰

Nonetheless, as I have pointed out throughout Part C of this thesis, not everyone adopts a Rawlsian conception of democracy to interpret the Brazilian egalitarian model of regulation. For those who read article 14 paragraph 9 of the Constitution from a Schumpeterian perspective, the law should ensure that people hear a balanced deliberation between at least two alternative political elites. Therefore, even for some Schumpeterians, the Constitution may still imply that the law should be concerned with economic power’s impact on public opinion in the sense of pursuing a balanced deliberation between at least two political elites. In this way, I will also briefly discuss the extent to which a Schumpeterian perspective is compatible with the practical propositions that will follow below.

The control of mergers and acquisitions

It is impossible to grant everyone a television or radio broadcasting licence in a country. It is also unlikely that everyone will have the resources to establish and run an effective newspaper, with the financial capacity to make the necessary investments to deeply investigate political facts and distribute the newspaper to a wide range of people. In that sense, a complete dispersal of media ownership could harm the media’s watchdog role (that is, holding the state, particularly the government, to account and exposing its abuses of power), as well as its alleged function of helping the construction of a common national identity between the citizens of a country composed of different

⁷⁵⁹ See subsection 7.2.3.

⁷⁶⁰ Baker, *Media Concentration and Democracy: Why Ownership Matters*, 8. In addition, empirical research on the formation of public opinion and elections is complex. For example, it may be hard to determine how many voters were affected and to what extent they were affected by this or that media structure. See subsection 4.3.1.

communities.⁷⁶¹ Therefore, it seems impractical to completely disperse the traditional media markets.⁷⁶²

As a consequence, the principle of democratic media distribution mentioned above could be interpreted as a guarantee that *media ownership is representative of the different groups in society*.⁷⁶³ As highlighted by Rowbottom, ‘*this does not mean that media ownership has to be formally allocated to different groups, but that a less concentrated media ownership makes it more likely that each major group will have its own media outlet*’.⁷⁶⁴

Having in mind the impracticality of a complete dispersal of the traditional media markets, what should be a reasonable limit to ownership concentration in the traditional media markets? The German model for broadcasting, where 30% of the

⁷⁶¹ See Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet*, 103–168.

⁷⁶² Even within the internet, where everyone has an opportunity to speak, media corporations — such as Google and Facebook — have the power to organise the platform and, therefore, impact the dissemination of information. Consequently, they have the power to influence the chance of a given voice being heard. But large dispersal of the ownership of internet corporations would also be quite controversial because it is indisputable that society has benefitted from the unprecedented flow of information and communication among people that corporations, such as Google and Facebook, have allowed. In order to continue offering these services with quality, perhaps they need financial resources to invest. In addition, ‘network effects’ need to be considered. That is, the more users an online platform has, the greater its value for people. However, the power that platforms such as Google and Facebook have over the forum of political deliberation is something to be observed. The algorithm of these companies determines which websites, news, or posts will appear first to the internet user. This has been a matter of discussion in many countries. For instance, the Digital, Culture, Media and Sport Committee appointed by the House of Commons in the UK has recommended that social media companies should inform “users of how their sites work, including (...) the way in which algorithms are used to prioritise certain stories, news and videos, depending on each user’s profile”, as well as how their curation functions work (Paragraph 315). See Digital, Culture, Media and Sport Committee, *Disinformation and ‘fake news’: Final Report* (HC 2017-19, 1791). Along these lines, some scholars have suggested that leading scientific institutions should act as trustees of these algorithms, ‘in order to create sufficient transparency and trust’. See, Dirk Helbing and others, *Will Democracy Survive Big Data and Artificial Intelligence?* (2017); Hartmann, ‘Liberdade de Manifestação Política e Campanhas: É Preciso Atenção aos Algoritmos’. Although relevant, this topic is beyond the scope of this thesis, which is focused on media corporations that produce content (ie, the traditional media). I acknowledge that internet media corporations who do not produce content (but nonetheless manage a platform) are crucial to today’s democratic deliberations and, as such, should also be discussed. However, this is a complex topic because of economic (eg, network effects) and legal (eg, transnational regulation) features, which must be left to be properly addressed at another time.

⁷⁶³ Baker, *Media Concentration and Democracy: Why Ownership Matters*, 11.

⁷⁶⁴ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 186 (emphasis added).

aggregate audience⁷⁶⁵ is assumed to represent a ‘predominant influence on public opinion’,⁷⁶⁶ could serve as inspiration for Brazilian policymakers to consider and eventually adapt to Brazil’s circumstances.

Under this framework, mergers and acquisitions that will result in more than 30% of the aggregate audience should not be cleared. Moreover, if a corporation already has more than this cap, competitors should have enough financial resources to compete effectively and try to reduce this margin. To achieve this objective, direct financial subsidies⁷⁶⁷ can be used to promote plurality and pursue diversity.⁷⁶⁸ Finally, another form of subsidy can be implemented by relaxing the media property of concentrated media corporations — in Germany, if an individual private television channel reaches 10% of audience share, it is obligated to make available part of its airtime to an independent media service provider, chosen by regulators.⁷⁶⁹

In Brazil, Globo TV has 56% of the preferences.⁷⁷⁰ Thus, not only is television the media source with the most impact on the Brazilian public opinion, it is also a market led by a *private* channel that has a predominant influence on public opinion. Therefore, in order to deconcentrate this sector according to a regulation based on the principle of democratic media distribution, it is required not only the control of mergers and acquisitions, but also policies to assure that different groups in society are granted television licences and financial public subsidies to compete effectively with Globo TV.

⁷⁶⁵ Aggregate audience means the average annual viewer rating of a company.

⁷⁶⁶ Article 26 Section 2 of the *Rundfunkstaatsvertrag* (Interstate Broadcasting Agreement). For a discussion about the German legislation on media concentration, see Humphreys, 'Transferable Media Pluralism Policies from Europe' 163–164.

⁷⁶⁷ Indirect subsidies are the ones assigned to all media entities regardless of the owner or content. For example, a tax break to all newspapers. Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 197. However, they seem to be of little use if the scope is to stimulate diversity of content.

⁷⁶⁸ Ibid 186.

⁷⁶⁹ Article 26 section 5 of the *Rundfunkstaatsvertrag*. For a discussion on the topic, see Humphreys, 'Transferable Media Pluralism Policies from Europe' 164.

⁷⁷⁰ Presidência da República, Secretaria de Comunicação Social, 'Relatório Final Pesquisa Brasileira de Mídia — PBM 2016', 17.

Although the German assumption of ‘predominant influence on public opinion’ is related to broadcasting, under the principle of democratic media distribution that assumption could be expanded to other media markets, such as the press. This could be done without undermining press watchdog power.

Surely the cap of what may be considered ‘predominant influence on public opinion’ is open to discussion. Under a Schumpeterian conception of democracy, the cap could be adjusted to 50%. To put it differently, it could be reasonable to establish that no private media should have more than 50% of the aggregate audience in their markets, to protect the possibility of political elites’ alternation in office.

The deconcentration through subsidies

Although radio and the press are more dispersed than the television sector (no media group has 30% or more of the preferences in those markets, according to some accounts⁷⁷¹), direct subsidies to these media may also be necessary if we want to empower various groups of society with their own media and make it more likely that society will have a circulation of ideas and information from different perspectives, and consequently a media with an effective watchdog function whatever government is in power.⁷⁷²

Besides empowering the various groups of society with their own media, subsidies may be helpful in guaranteeing that a plurality of media ownership translates

⁷⁷¹ See Presidência da República, Secretaria de Comunicação Social, ‘Relatório Final Pesquisa Brasileira de Mídia — PBM 2016’.

⁷⁷² It should be noted that, although the newspaper market is more plural than the television one, the three largest broadsheet newspapers have had a similar conservative political alignment. For the plurality of the market, see Presidência da República, Secretaria de Comunicação Social, ‘Relatório Final Pesquisa Brasileira de Mídia — PBM 2016’, 22–23. For the diversity of the market, Feres Júnior and others, ‘A (in)clemente Mídia das Eleições’. Of course, the media’s conservative ideology is not a problem per se. The problem is the lack of other views.

into a *diversity of content*.⁷⁷³ Since a plural media sector remains exposed to market pressures, such as those from advertisers, it seems reasonable that certain media corporations receive direct subsidies to be able to produce diverse content.

When we talk about using direct subsidies to foster diversity of content, perhaps it is inevitable to ask: what *level of diversity* should be used as a standard to guide subsidy allocation? One approach ‘would be to take the range of political parties as a template for the ideal range of diverse views’.⁷⁷⁴ Although Brazil currently has 35 political parties (many lacking clear ideology patterns), political scientists have been able to classify the main ones according to their ideology.⁷⁷⁵ An alternative may be the use of the classic division of the political spectrum: left, centre-left, centre, centre-right and right.⁷⁷⁶

For the Schumpeterians who assume that competition between political elites should take the form of a rivalry between a more conservative group and a more progressive one, subsidies may be eventually suitable to assure the production of diverse journalistic information in those two perspectives.

Another question is the method to be used for the *classification* of media outlets. For existing media outlets, a possible method could be the valence analysis, such as the

⁷⁷³ For arguments questioning the idea that plurality of media ownership alone translates into a diversity of content, see Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 187–189. For models that try to demonstrate why plurality of ownership does not necessarily turn into content diversity, see Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet*, 121–131.

⁷⁷⁴ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 198.

⁷⁷⁵ See, Power and Zucco, 'Elite Preferences in a Consolidating Democracy: The Brazilian Legislative Surveys, 1990–2009'. A C Figueiredo and F Limongi, 'Presidential Power, Legislative Organization, and Party Behavior in Brazil' (2000) 32 *Comparative Politics* 151. See section 2.2 for a description of the Brazilian party system.

⁷⁷⁶ An issue that might need to be addressed is whether groups whose proposals may be seen as anti-democratic should be allowed to receive subsidies; and, if not, what should be considered as anti-democratic.

one implemented by the Laboratory of Media Studies and Public Sphere (LEMEP).⁷⁷⁷ For groups that are entering the market, a historical/sociological analysis may be suitable.

Choosing the appropriate criteria for the distribution of direct subsidies seems to be the greatest challenge for the implementation of this policy. What it seems safe to say is that the qualification criteria for direct subsidies must be as objective as possible, and be implemented by an independent regulatory body,⁷⁷⁸ in order to prevent the partisan use of public funds.

In short, to avoid partisan media regulation, it seems reasonable to: (i) establish objective caps for media concentration; (ii) establish objective qualification criteria for financial subsidies; (iii) establish objective criteria for independent media access to the airtime of concentrated private broadcast corporations; (iv) establish objective criteria for the distribution of broadcast licences;⁷⁷⁹ and (v) grant the power to enforce those criteria to an independent regulatory body, like the one I briefly described in subsection 7.3.7.

Apart from *partially* funding private press organisations or broadcasters, another type of state financial subsidy can be provided through grants to fully fund a *state-owned media*.

In an already polarised media environment like Brazil's, media deconcentration may make the debate even more divided, making it less likely that the public will hear

⁷⁷⁷ In which three specialists analyse whether the media's headlines and texts are positive, negative, neutral or ambivalent to the image of the candidate, party, person or government to which it refers. Laboratory on Media and the Public Sphere (LEMEP) of the Rio de Janeiro State University (UERJ), 'Metodologia' (*Manchetômetro*) <<http://www.manchetometro.com.br/index.php/objetivos-metodologias/>> accessed 9 November 2017.

⁷⁷⁸ See subsection 7.3.7.

⁷⁷⁹ Currently, the Ministry of Education has the authority to grant television concessions. For a discussion of the implications of this framework, see is Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet*, 80–97.

competing arguments.⁷⁸⁰ Therefore, a public television channel may be useful as a forum for people to hear and evaluate competing views. The BBC (British Broadcasting Corporation) in the United Kingdom is perhaps the foremost example.

Once again, independence is key here. There are basically two ways to foster the independence of state-owned television channels. One is the British model, where the tradition has been to separate the state-owned media from political actors. The BBC is governed by an independent trust, run according to professional standards.⁷⁸¹ Another model is the German one, where political parties participate proportionally in the independent managing body: each state-owned broadcaster is run by an independent body composed of representatives of the political parties and socially relevant groups, such as trade unions, churches, industrial and professional associations.⁷⁸²

Brazil already has a national public television, but it arguably lacks independence and proper funding. Founded in 2007, the EBC (acronym in Portuguese for *Empresa Brasileira de Comunicação*), launched the first public national television channel, ‘TV Brasil’. However, according to media scholars such as Eugênio Bucci, Alexandre Faraco and Christof Mauersberger, EBC’s legal structure is more of a governmental rather than a public independent broadcaster.⁷⁸³ Moreover, it apparently lacks proper funding: in 2013, EBC had a total budget of around £139 million,⁷⁸⁴ while

⁷⁸⁰ Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, 189.

⁷⁸¹ Ibid 200.

⁷⁸² Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge University Press 2004) 167–168.

⁷⁸³ Eugênio Bucci, *O Estado de Narciso: A comunicação pública a serviço da vaidade particular* (Companhia das Letras 2015) 112–117. Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet* 243–244. Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America: Whose Voice Gets on the Air?* 169.

⁷⁸⁴ EBC, ‘Qual o orçamento da EBC nos últimos anos? Qual o total executado no mesmo período?’ <<http://www.ebc.com.br/institucional/lei-de-acesso-a-informacao/qual-o-orcamento-da-ebc-nos-ultimos-anos-qual-o-total-executado-no-mesmo>> accessed 3 November 2017. Faraco argues that Brazilian public broadcasters should have funding that is independent of the politicians’ annual decision on the distribution of public resources. Faraco, *Democracia e Regulação das Redes Eletrônicas de Comunicação: Rádio, Televisão e Internet*, 250.

the BBC had a budget of £2.4 billion to spend on television in the European financial year of 2013/14.⁷⁸⁵

8.4. Conclusion of the chapter

I have proposed a twofold approach to regulate the concentration of private donations and expenditures. The first step would be to implement vouchers or uniform low caps for individuals' donations and expenditures, to avoid the translation of economic inequalities into political inequalities. The second step would be the introduction of legislation to avoid the risk of bundling.

The regulation proposed here has no relation to the question of how the economy should be structured. The only exemption concerns the media. The media is decisive for democracy. They reach thousands and frequently millions of people, and their political coverage has an immense power to shape public opinion.

Social media changed the dynamics of the flow of communication to a great extent: (1) online platforms, such as Facebook and Twitter, enable direct communication between politicians and voters (making easier the communication between them without the mediation of the traditional media or public funding); and (2) those same social media platforms, along with WhatsApp, encourage communication between citizens (facilitating, for instance, the organisation of protests, deliberation and spread of rumours). However, the internet's limitations should not be overlooked, and we should not overestimate the impact of new media corporations on public opinion. Firstly, as of February 2019, television has a greater reach: evidence shows that more Brazilians consume news about politics through television than the internet. And, secondly,

⁷⁸⁵ Ashley Kirk, 'How does the BBC spend its £3.7bn in licence fee money?' *The Telegraph* (14 April 2016) <<http://www.telegraph.co.uk/news/2016/04/14/how-does-the-bbc-spend-its-5bn-in-licence-fee-money/>> accessed 3 November 2017.

evidence suggests that the debate within the internet is largely constrained by how much people trust the information consumed and, as such, is largely constrained by the content produced by the traditional media published online (who produce, by far, the most trustworthy news in the eyes of most Brazilians). Traditional media corporations are, and apparently will still be, important for the formation of public opinion in Brazil even after the emergence of social media and messaging apps.

Therefore, the regulation of the traditional media advanced in this chapter is relevant to the country's democratic deliberation.

Considering that the Constitution requires that elections should take place without the influence of economic power, as far as possible; and that the media is the form of economic power which most influences the forum of political deliberation; it follows that the Brazilian media structure should be designed in a way to mitigate the impact of media's economic power over elections. I have argued that the electoral legislation regarding media access and impartiality of broadcast corporations is not (and will never be) sufficient to satisfactorily mitigate the influence of media's economic power over elections.

Therefore, in accordance with the Rawlsian interpretation of the Constitution, I have proposed a regulation based on Baker's *principle of democratic media distribution* — that is, concerned with non-commodified values, such as democratic distribution and power to impact public opinion. However, as a complete dispersal of media structure is unsustainable (since, for instance, private media can be an effective instrument to hold the government to account), we should focus on having less concentration and stimulating diversity of content.

In order to achieve that, there are two basic measures. A 'negative' one: controlling media ownership concentration, in order to avoid concentrations that will

harm the forum of political deliberation — in this respect, perhaps Brazil could learn lessons with the regulation in Germany, where 30% of the audience in the broadcasting market is assumed to represent a ‘predominant influence on public opinion’. Although the German assumption is related to broadcasting, under the principle of democratic media distribution that assumption could be expanded to other media markets, such as the press. Any merger above those limits would be rejected. For those who take a Schumpeterian perspective of democracy, that cap could be adjusted to 50%.

And a ‘positive’ measure, by giving ‘megaphones’ to the lower voices. Distribution of subsidies is necessary not only to empower media outlets from different groups within society, but also to help to ensure that a plurality of ownership translates into a *diversity of content* (this might be suitable even for those Schumpeterians who support a competition between a more conservative and a more progressive political elite) — however, the greatest challenge for the implementation of direct subsidies seems to be the difficulty in choosing the appropriate criteria for distribution. Finally, it is also proper to consider the creation of an independent public television channel with a proper level of funding, as a forum for people to hear and evaluate competing views.

The regulation of political competition between *non-candidate* individuals and their groups is important also because of its indirect impact on the equality of opportunity between *those who pursue public office*. Without a regulation of the concentration of political donations and expenditures, there is a greater risk of war chest corruption, which may benefit those parties and candidates that are aligned with the wealthy. And, without regulation of media structure and the diverse debate within it, there is a risk that the media will become concentrated and uniform, which may benefit the parties and candidates that are aligned with the media’s hegemonic discourse.

As this chapter has focused on the *non-candidate citizens'* opportunity to influence the forum of political deliberation, the next chapter will discuss how those citizens and groups that want to *run for public office* should compete.

Chapter Nine

The regulation of the competition between political parties and their candidates

9.1. Introduction

In the last chapter, we focused on *non-candidate citizens'* opportunity to influence democratic deliberation. But what about those *citizens who want to run for office*? This chapter will focus on them.

Although crucial during elections, equality of opportunity between parties⁷⁸⁶ must be in force at all times, including non-electoral periods. This principle covers the entire process of competition between parties: their registration, their funding, access to the media, the neutrality of the state (that is, governments must avoid using state resources to distort party competition), and so forth.⁷⁸⁷

In this chapter, I will focus on the main economic resources of parties and their candidates to compete — that is, their financial funding and media access. Firstly, section 9.2 will very briefly explain the legal framework which structures the competition between parties in Brazil with respect to those resources. Secondly, I will argue in section 9.3 that the majorities in the Brazilian Supreme Court have consolidated a principle of ‘graduated’ equality of opportunity to the competition between parties —

⁷⁸⁶ In Brazil, candidates are required to belong to a party to run for political office (article 14, paragraph 3, item V, of the Constitution of 1988). See section 2.2.

⁷⁸⁷ In this respect, see Mr Justice Gilmar Mendes’ opinion in STF, ADIs 1351 e 1354, Rel Min Marco Aurélio Mello, DJ 30/03/2007, Inteiro Teor do Acórdão 146.

but that there has been a controversy within the Court between those majorities and those justices who support a ‘full’ equality of opportunity. I will then suggest a legal framework to help to solve this controversy. Finally, I will briefly highlight the importance of effective sanctions in the electoral law arena and argue that the legal framework proposed here may help judges to overcome the usual hesitation with respect to applying severe sanctions. As discussed in chapter seven, the approach advanced here will be based on normative principles (such as the right to compete for office with equal opportunity and the people’s right to hear a balanced political deliberation),⁷⁸⁸ which may not be necessarily linked with consequential values (such as government responsiveness).⁷⁸⁹

⁷⁸⁸ Muñoz takes a similar approach. Sánchez Muñoz, *La Igualdad de Oportunidades en las Competiciones Electorales*, 23.

⁷⁸⁹ Therefore, this viewpoint is different from instrumental approaches, such as the *political marketers* in the United States, who claim that the main objective of regulation of political competition is to foster accountability. For political market scholars, effective fair competition between political parties produces a free and uncorrupted choice by citizens, which, in turn, produces *responsiveness*. This means that competition in the political arena would allow the policy outcomes of the political process to be *responsive* to the interest and views of the citizens. Competition between political parties would enhance the ability of voters to vote officials out of office, in an after-the-fact capacity. For political marketers, this accountability to the electorate would be the prime guarantor of democratic legitimacy. Nevertheless, there are criticisms about this approach, such as a contestation of the link between competition and responsiveness. For a view of the political marketers approach, see Samuel Issacharoff and Richard H Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) *Stanford Law Review* 643 646; Samuel Issacharoff, 'Gerrymandering and Political Cartels' (2002) *Harvard Law Review* 593 615; Nathaniel Persily and Bruce E Cain, 'The Legal Status of Political Parties: A Reassessment of Competing Paradigms' (2000) 100 *Columbia Law Review* 775 791. For a brief critique of the political marketer approach, see Richard L Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (NYU Press 2006) 152. Yen-Tu Su puts the political marketer approach as part of what he labels as the ‘political antitrust’ tradition under the American law of democracy. Su claims that several American scholars have worked on a modern political antitrust aimed to protect ‘competitive democracy from both excessive self-interested political regulation and judicial over-constitutionalising of democratic institutional design’, which he argues can be seen as a confluence of the tradition of process-oriented theories of judicial review — influenced by John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) — and the tradition of theories of competitive democracy — influenced by Joseph A Schumpeter, *Capitalism, Socialism, and Democracy*. Yen-Tu Su, 'Retracing Political Antitrust: A Genealogy and Its Lessons' (2011) 27 *Journal of Law and Politics*.

9.2. The Brazilian legislative framework on the competition between parties

The Constitution, in its article 1 item V, establishes that the Federative Republic of Brazil is a ‘legal democratic state’ founded on political pluralism.⁷⁹⁰

To protect political plurality against the abuse of the state, the Elections Act 1997 prohibits public agents from performing several practices during elections (article 73). This provision aims to guarantee state neutrality and *expressly* justifies the ban on the basis of a potential impact on the ‘equality of opportunity between candidates in elections’.⁷⁹¹

⁷⁹⁰ Constituição da República Federativa do Brasil, 1988.

⁷⁹¹ Article 73 of the Lei nº 9504/1997. Eneida Salgado argues, however, that the legislation establishes exceptions that may give the incumbent an initial advantage, such as the use of official transportation (even though reimbursement is required), the use of residences and the use of materials and services that do not ‘exceed prerogatives’. Salgado highlights that there is great difficulty in drawing the line between the state’s compliance with the principle of publicity and the personal promotion of the public servant who might run for re-election — and this might be aggravated when the head of the executive branch is running for re-election. See Eneida Desiree Salgado, ‘Princípios Constitucionais Estruturantes do Direito Eleitoral’ (Tese de Doutorado em Direito, Universidade Federal do Paraná 2010) 275. Legislation addressing the potential use of state resources by incumbents for electoral purposes must be continuously readdressed and, if possible, improved. It is also difficult to draw the line between the state’s principle of publicity and undue influence on elections when the police or another investigation department announces developments on investigations concerning the candidates, particularly during elections. See, for instance, the case involving Hillary Clinton and the Federal Bureau of Investigation (FBI) in the United States — Julia Edwards Ainsley and Julia Harte, ‘FBI investigated over pre-election decisions on Clinton email’ *Reuters* (12 January 2017) <<http://www.reuters.com/article/us-usa-election-clinton/fbi-investigated-over-pre-election-decisions-on-clinton-email-idUSKBN14W2NT>> accessed 26 October 2017. The influence of the police might also occur when the head of the executive is being pressured to step out of office. For example, some argue that Lula’s detention by the police — a week before a scheduled protest of opposition groups against Dilma Rousseff’s administration — stimulated the population to join the protest (the date of the protest was announced in February 22; Lula was detained on March 4; and the protest occurred on March 13, 2016). The reason given by the authorities for the detention was unusual and controversial. Around 3.5 million people joined the anti-government rallies across the country, and this was one of the factors that influenced Rousseff’s impeachment. See Zlata Rodionova, ‘Former President Lula is detained by police over Petrobras scandal’ *The Independent* (4 March 2016) <<http://www.independent.co.uk/news/business/news/former-president-lulas-home-raided-by-police-over-petrobras-scandal-a6911281.html>> accessed 26 October 2017; and Jonathan Watts, ‘More than a million Brazilians protest against ‘horror’ government’ *The Guardian* (14 March 2016) <<https://www.theguardian.com/world/2016/mar/13/brazil-anti-government-protests-dilma-rousseff-rio-de-janeiro>> accessed 26 October 2017. For some of the legal experts’ opinions about Lula’s detention, see Rodolfo Borges, ‘Juristas questionam legalidade de coerção para depoimento de Lula’ *El País* (4 March 2016) <https://brasil.elpais.com/brasil/2016/03/04/politica/1457122084_713393.html> accessed 26 October 2017. Although these measures of independent agencies do affect the forum of political deliberation, this is beyond the scope of this thesis, which is the inequalities in political speech that emerge because of inequalities of wealth.

But the neutrality of the state is not enough to guarantee political plurality.

To compete effectively in a democracy, political parties and their candidates must be able to reach voters. The voter must get to know the candidates' proposals. As once put by Justice Byron White in the US, 'communicating with potential voters is the heart of an election campaign'.⁷⁹²

Funding and access to the media are key items to communicate with potential voters. That is why the Brazilian Constitution grants parties public funding and free access to free-to-air broadcasts (article 17 paras 3). Parties may also pursue private money and candidates may use their personal resources, as established by infra-constitutional legislation. This legislation also guarantees transparency, so voters get to know how the parties and candidates are being funded, and recently established spending limits for parties and candidates.⁷⁹³ These aspects will be addressed throughout this chapter.

9.3. The Brazilian Supreme Court and the principle of equality of opportunity between political parties

As many other constitutional courts around the world,⁷⁹⁴ the Brazilian Supreme Court has been trying to protect political competition. The Court has focused on the protection of political minorities and the openness of channels for political change.

The premise behind those efforts is that politicians and parties often act with excessive self-interest⁷⁹⁵ and that, as a consequence, large parties try to diminish the

⁷⁹² *Buckley v Valeo*.

⁷⁹³ For details, see chapter three.

⁷⁹⁴ See Martin Morlok, 'A Comparative Presentation on Constitutional Courts as Guardians of Competition between Political Parties' (2007) 13 *Juridica International* 94.

emergence and development of minorities. In other words, the majority often change legislation in self-benefit, undermining minorities' opportunity to compete.

The distribution of party public resources granted by the Constitution has been one of the most controversial topics analysed by the Supreme Court. By analysing this issue, the Court has developed a principle of 'graduated' equality of opportunity between parties.

9.3.1. The development of the principle of 'graduated' equality of opportunity

The development of the principle of graduated equality of opportunity in Brazil has had three waves: (i) the case *ADI 1351 and 1354*, decided in 2006; (ii) the case *ADI 4430 and 4795*, decided in 2013; (iii) and finally the case *ADI 5423 and 5491*, decided in 2016.

Case ADI 1351 and 1354

It all started in 2006, when the Brazilian Supreme Court took a ground-breaking decision, ruling that the 'equality of opportunity between parties' principle is part of the Brazilian constitutional order (*ADI 1351 and 1354*).⁷⁹⁵

The Court held *unconstitutional* statutory provisions introduced by Congress that established a barrier clause for political parties⁷⁹⁷ to: (i) exercise their 'parliamentary

⁷⁹⁵ When articulating this assumption, lawyers, judges and legal scholars often make reference to Ely, *Democracy and Distrust: A Theory of Judicial Review*.

⁷⁹⁶ STF, ADI 1351 e 1354. Those terms were quoted from Justice Mendes's opinion, *ibid*, Inteiro Teor do Acórdão 140. I owe much of the structure of this subsection to the reading of Osório's *Direito Eleitoral e Liberdade de Expressão*.

working'; and (ii) receive public funding and free airtime in the broadcasts during non-electoral periods.⁷⁹⁷ The legislation established that 99% of the non-electoral public fund should be distributed to the parties that fulfilled the conditions set by the barrier clause; and 1% of the fund should be distributed equally to all political parties. Moreover, the legislation established that the political parties that did not meet the requirements established by the barrier clause would have the right only to a *two-minute program* on the national free-to-air broadcast, per semester; while the political parties that achieved the requirements would have the right to a program on national free-to-air broadcast ten times higher, that is 20 minutes per semester, not mentioning additional 20 minutes for state free-to-air broadcasts and several others insertions of one minute or thirty seconds.

Unanimously, the Court took the view that the barrier clause mitigated what was guaranteed to the political parties by the Constitution (exercise the parliamentary work after being elected, access to public funding, and free access to broadcast), and consequently deprived smaller parties of participation in the political arena.⁷⁹⁹ The justices ruled that the principle of equality of opportunity between political parties is part of the Constitution.⁸⁰⁰

That decision turned out to be quite controversial: it was later regretted by some of the justices who took part in it. For them, it later came to light that perhaps the Court should have maintained the barrier clause, due to the excessive numbers of political

⁷⁹⁷ Each party would have to obtain the support of at least 5% of the votes cast, distributed in at least 1/3 of the states, with a minimum of 2% in each of them.

⁷⁹⁸ The Brazilian legislation granted access to broadcast to all parties also during non-electoral periods at that time, but non-electoral access was later revoked by a reform of the legislation.

⁷⁹⁹ According to the opinion of the reporter of the case, Justice Marco Aurélio Mello, followed unanimously by the other justices.

⁸⁰⁰ For a summary of the arguments used by the Court, see Adriana Ancona de Faria, 'O Ativismo Judicial do STF no Campo Político-Eleitoral: Riscos Antidemocráticos' (Tese de Doutorado em Direito, Pontifícia Universidade Católica de São Paulo — PUC/SP 2013) 110.

parties in Brazil, which has arguably been harming the party system and the system of government.⁸⁰¹

Hence, the Court's next decisions developed the view that the equality of opportunity for political parties prescribed by the Constitution is a *graduated* one.

Case ADI 4430 and 4795

The consolidation of the graduated equality of opportunity principle began in 2013, with the case *ADI 4430 and 4795*, when the Supreme Court held that the criterion established by infra-constitutional legislation regarding the distribution of free airtime in broadcasts during elections — at that moment, 1/3 of the time distributed equally to all political parties and 2/3 of the time distributed in proportion to the number of representatives in the Chamber of Deputies during the last legislature — was in accordance with the Constitution.⁸⁰²

Justice Dias Toffoli, who was the reporter for the case and the leading vote for the majority, argued that the criterion simultaneously (i) reserved a space for minorities and (ii) *took into account the historical reality that some political parties have repeatedly been proven to have more representation within society*.⁸⁰³ To put it another way, although the criterion divided the time unevenly among the political parties, it did not nullify the participation of the smaller political parties.⁸⁰⁴

Therefore, the Court ruled that the principle of equality of opportunity between political parties should be *graduated*, taking into account factors such as historical context.

⁸⁰¹ Osório, *Direito Eleitoral e Liberdade de Expressão*, 295.

⁸⁰² STF, ADIs 4430 e 4795, Rel Min Dias Toffoli, DJ 03/08/2012.

⁸⁰³ Ibid, Inteiro Teor do Acórdão 44.

⁸⁰⁴ Ibid, Inteiro Teor do Acórdão 46.

Finally, it should also be noted that the Court decided that the ‘1/3 of the time distributed equally to all political parties’ shall be distributed to all political parties, regardless of representation in the Chamber of Deputies.

Case ADI 5423 and 5491

The principle of graduated equality of chance between political parties was confirmed by the Supreme Court in 2016, when deciding the *ADI 5423 and 5491* case, which once again concerned the access of political parties to free-to-air broadcasts during elections. Several small political parties petitioned the Supreme Court, arguing that a new legislation introduced in 2015 violated the *equality of opportunity to compete* established by the Constitution.⁸⁰⁵ The new legislation increased the broadcast time for larger parties: it established that only 10% of the broadcast time would be distributed equally to all political parties during elections, instead of the previous 1/3; and 90% of the broadcast time during elections would be distributed in proportion to the number of representatives in the Chamber of Deputies of the last legislature, in place of the previous 2/3.

The majority of the Court, once again led by Justice Toffoli, held that the new criterion was in accordance with the Constitution, basically by repeating the same rationale applied in 2013. That is: the new legislation aptly (i) considered the fact that some political parties, who have historically and repeatedly proven to have representation within society, should have more time; (ii) but simultaneously reserved a space for all minorities to compete, enabling a renovation of the representatives.⁸⁰⁶

⁸⁰⁵ Lei n° 13165/2015.

⁸⁰⁶ STF, ADIs 5491 e 5423, Rel Min Dias Toffoli, DJ 30/08/2016.

Therefore, by referring to the *ADI 4430 and 4795* case, the Court upheld the understanding that a *graduated* equality of opportunity is in accordance with the Constitution.

The plaintiffs in the case also contested the cap introduced by the new legislation with respect to the broadcast time of coalitions in elections for President and the Senate. Formerly, the broadcast time was calculated based on the sum of the number of representatives of *all* parties of the coalition. Therefore, the more parties a coalition had, the better. But the new legislation introduced a cap: only the seats of the *six largest parties* of the coalition would count. For the plaintiffs, the smaller parties of a coalition of more than six parties would have their broadcast time shrunk by this new legislation.⁸⁰⁷

On this issue, the majority of the Court led by Justice Tofolli held that the new legislation was constitutionally justified because it had the potential of *protecting the party system, as well as the system of government*. For Mr Tofolli, the legislation contributed to eliminating what he called an ‘anomaly’ of the Brazilian party system: the largest parties building an electoral coalition with several small parties, with the sole aim of having more time on the broadcast. He took the view that coalitions of parties occur for a purely pragmatic reason: several *small parties* ‘sell’ their broadcasting time in exchange for subsequent ‘favours’ in government (for example, a public office, in case the coalition wins the election).⁸⁰⁸ The result of this frequent electoral strategy is the formation of huge coalitions that often lack any ideological identification between the parties, which for Justice Tofolli reveals a deviation from the constitutional scope of political parties and coalitions, that of serving as the intermediary of popular representation by gathering shared principles and ideas.

⁸⁰⁷ STF, ADI 5423, Inteiro Teor do Acórdão 5.

⁸⁰⁸ See section 2.3.

Furthermore, Justice Tofolli argued that this practice has an additional negative impact on the party system because it encourages the proliferation of so-called *partidos de aluguel* ('renting political parties'), that is, political parties created with no ideological motivation. The sole purpose of these *partidos de aluguel* would be to feed the non-ideological huge coalition, that is, to sell their broadcast time (that they automatically earn after the party is created) in exchange for a place in public office if the coalition wins the election.

Finally, Justice Tofolli argued that limiting the sum of the broadcast time of coalitions may also result in better protection of the stability of the system of government. For him, the Brazilian multiparty system enshrined by the Constitution has been transformed into a 'pulverized' party system (there are 26 parties with representation in Congress as of June 2018),⁸⁰⁹ which makes it difficult to approve bills (especially significant reforms) and stimulates a dynamic in which governing coalitions are formed and broken according to interests, generating institutional instability.⁸¹⁰

⁸⁰⁹ See section 2.2.

⁸¹⁰ STF, ADI 5491, Inteiro Teor do Acórdão 23–28. STF, ADI 5423, Inteiro Teor do Acórdão 32–38. During the same session, the Court also decided an issue regarding participation in debates. The new legislation established that only political parties (or coalitions) with ten or more seats in the Chamber of Deputies would have a right to participate in electoral debates; and the majority of the Court decided that this introduction was in accordance with the Constitution. But the Court ruled that, if a given television company decides to invite to the debate a candidate of a party that has a representation of less than ten federal deputies, the other candidates could not veto his presence — see STF, ADI 5423; and STF, ADIs 5487 e 5488, Rel Min Rosa Weber, Voto Vencedor Luís Barroso, DJ 15/02/2018; STF, ADI 5577, Rel Min Rosa Weber, DJ 15/02/2018. Therefore, a candidate from a smaller party would only participate in the television debate if the television company decided to invite him or if 2/3 of the parties with more than ten federal deputies agreed to invite him. A new legislation introduced in 2017 decreased this minimum number of deputies to five — Lei nº 13488/2017. In my view, this provision shows the importance of plurality in the television sector. A plural structure is important to avoid risks of television owners' partisan decisions that will harm those candidates which, although may have a good position in the polls, do not belong to parties that have more than five representatives and are against media interests.

9.3.2. The meaning of a ‘graduated’ equality of opportunity

As we have seen, the Supreme Court has ruled that all parties are entitled to party funding and free airtime in broadcast, regardless of representation in the Chamber of Deputies (see especially *ADI 4430/4795*). In this way, the Court decided in the *ADI 5105*, in 2015, that *once a political party is created, it has the right to participate in the political process by having reasonable access to public funding and to broadcast*, both granted by the Constitution.⁸¹¹ In other words, it held that all minorities have a right to access public funding and broadcast.

But the question is: *how much* (of public funding and broadcast) are minorities⁸¹² entitled to have, in order to have the opportunity to develop?

There are basically two possible approaches to answer this question. One is that political parties should operate under *full* equality of opportunity, as has been argued by Justice Marco Aurélio Mello.⁸¹³ For Justice Mello, since the Constitution does not create ‘first and second class’ parties; and since all parties have a constitutional right to party funding and access to free-to-air broadcasts; the distribution should be *strictly* equal.⁸¹⁴ If the infra-constitutional legislation grants a ‘privilege’ to parties with more representation in Chamber of Deputies, this will tend to perpetuate the *status quo*, because these larger parties will have greater opportunity to address the people and,

⁸¹¹ STF, *ADI 5105*, Rel Min Luiz Fux, DJ 14/10/2015. As written by Justice Luiz Fux, the reporter of the case and the leading opinion for the majority, one thing is to create rigorous mechanisms for the creation, merger and incorporation of political parties, which may be in accordance with the Constitution; something quite different is, once the political party has been created, to create norms that hinder the new party’s operation, which does not find shelter in the Constitution. *Inteiro Teor do Acórdão 5*.

⁸¹² Both entrants and already established minorities.

⁸¹³ See *ADIs 1351/1354*, *ADIs 4430/4795* and *ADIs 5491/5423*.

⁸¹⁴ STF, *ADI 4430*, *Inteiro Teor do Acórdão 180–181*. Therefore, there would be no margin for the infra-constitutional legislator to distribute parties’ resources unequally.

therefore, to renew their representation — as argued by Justice Cezar Peluso, another supporter of this view.⁸¹⁵

Moreover, according to the supporters of *full* equality of opportunity, the problem of the pulverisation of the Brazilian party system should be fixed by tightening up the criteria for the creation of new parties,⁸¹⁶ since the current ones would be arguably too loose.⁸¹⁷ To put it differently, the problem of party system pulverisation should be fixed not by changing the distribution of public resources, but by tightening up the criteria for the creation of new parties.

However, the approach that has prevailed within the Supreme Court is that parties should operate under a *graduated* equality of opportunity. In the Brazilian context, this has meant that *the more seats the political party has in the Chamber of Deputies, the more public funding and broadcast time the party should have*. This view has been famously advanced by Justice Gilmar Mendes since 2006, when the Court decided the *ADI 1351 and 1354* case. Justice Mendes based his reasoning on the German experience: the introduction of the concept of *abgestufte Chancengleichheit* (graduated equality of chance) by the German Constitutional Court in 1962 and its consolidation with the enactment of the German Political Parties Act of 1967.⁸¹⁸ The gradation of equal opportunity, as developed by the German Constitutional Court and established by the German Political Parties Act, must take into account the parties' participation in the formation of political will, and the best criterion for measuring that would be electoral performance.⁸¹⁹

⁸¹⁵ Ibid 168–169.

⁸¹⁶ Ibid 180.

⁸¹⁷ Ibid 169.

⁸¹⁸ STF, 1351 e 1354, Inteiro Teor do Acórdão 128–151.

⁸¹⁹ Ibid 134–137.

For the supporters of *graduated* equality of opportunity, a full equality of opportunity approach could stimulate the pulverisation of an already fragmented Brazilian party system. As summarised by Justice Tofolli, another supporter of the graduated approach,⁸²⁰ the largest Brazilian parties frequently build non-ideological coalitions with several small parties, in which the latter ‘sell’ their broadcast time (that they automatically earn after the party is created) in exchange for a place in public office.⁸²¹ And an increased pulverisation would also have an impact on the system of government because it would be more difficult to approve bills. In sum, a *graduated* equality of opportunity between parties would protect the party system and, consequently, the system of government more than *full* equality of opportunity.

9.4. A proposal for the regulation of parties’ resources to compete

Which principle should Brazil adopt: a *full* or a *graduated* equality of opportunity approach? As we have just seen, both have their disadvantages. Full equality of opportunity may harm the party system and the system of government, impairing the function of democracy. Graduated equality of chance, in turn, may harm the possibility of parties’ alternation in office.

⁸²⁰ Justice Tofolli took the *graduated* equality of opportunity approach in the decisions of the ADIs 4430/4795, in 2012, and ADIs 5491/5423, in 2016. Because he entered the Court in 2009, he did not take part in the decision of the ADIs 1351/1354 in 2006.

⁸²¹ Politicians may have incentives to open new parties because they may want to have a greater position of leadership within the party. See Sánchez Muñoz, *La Igualdad de Oportunidades en las Competiciones Electorales*, 28, 278–281.

9.4.1. A regulation based on party vouchers and control of influence over public opinion

There is no easy way to solve this dilemma. But a solution could be the implementation of party vouchers (one for money and another one for time on broadcast), with caps.

Party vouchers⁸²² could help to solve the controversy regarding the distribution of parties' public resources: the distribution would be put in the hands of the people. If voucher distribution takes place between elections (that is, around two years after each election), voucher distribution may be different from the representation in Congress (for which people voted two years earlier). It would not necessarily represent the same results of future elections either — it is perfectly possible that some people will decide to grant their voucher to one party (an emerging one) but prefer to vote for another (a more experienced and established one) when the time for election comes. Vouchers are best issued and redeemed before an election so that parties have the money they need to spend in the election. The administration should not be left too late in the electoral cycle for administrative reasons. Although Brazil has a system of compulsory voting, vouchers could be initially set as voluntary because one has the right to participate in the political deliberation only as a listener. It does not follow from compulsory voting that all aspects of the political process should be compulsory. Moreover, voluntary vouchers may help to minimise problems such as uneducated choices.

⁸²² See definition at footnote 674. Richard Hasen's proposal is for *campaign* vouchers for the United States' elections. In Brazil, vouchers would have to be extended to the parties' public funding (which is granted at all times) and access to broadcasting. Thus, the term *party* vouchers would be more suitable. A discussion that should be addressed is what level of public funding parties and candidates need. This is a hard question. As argued by Graeme Orr, 'pragmatically, it is almost impossible to devise a formula for what level of public funding a party needs year in, year out for its administration, membership development, conferences and policy development'. Orr, 'Full Public Funding: Cleaning Up Parties or Parties Cleaning Up?' 95.

However, although vouchers may be a good method to insulate the political sphere from inequalities in the economic sphere⁸²³ and to legitimise the distribution of parties' public resources, *it fails to provide a limit to inequality between political parties*. For example, a given party or coalition could win 80% of all vouchers. This would make the party or coalition more likely to win the election not only because it was popular before the election, but also because it had a greater opportunity to compete (that is, more money and time on the broadcast). In a voucher system, the greater the number of supporters from the start, the more chance the party will have for gaining new adherents regardless of the rationality of their policy proposals,⁸²⁴ the work capacity of their candidate or other characteristics relevant to voters. Therefore, if we want to boost the possibility of minorities becoming majorities by competing on the merits, there must be a limit to the concentration of parties' public resources that may arise from vouchers.

But what could be a reasonable limit? Or, to put it another way, how much public resources should a party be able to concentrate?

When we talk about competition between parties we are concerned about their influence on the formation of *public opinion*. And, since we are talking about public opinion, a parameter that could be used as inspiration is the one used by KEK, the German regulator body for television concentration, who assumes that 30% of aggregate audience represents a 'predominant influence on public opinion'.⁸²⁵ We could adapt this parameter to party competition. Under this view, no political party or electoral coalition shall have more than 30% of parties' financial resources or 30% of broadcast time. This way, we would have a greater equality of opportunity — in the 2014 election for President, for instance, the incumbent coalition led by the Workers' Party had 45.6% of

⁸²³ Under Hasen's proposal, all other sources of campaign money, such as private contributions, would be prohibited.

⁸²⁴ Brighouse, 'Political Equality and the Funding of Political Speech' 478.

⁸²⁵ See subsection 8.3.4.

the total broadcast time.⁸²⁶ A cap of 30% would be aligned more closely with the Rawlsian conception of democracy. But the exact cap is open to discussion. In this respect, the cap could be set at 50%, to be coherent with the Schumpeterian conception of democracy. Such a cap on political parties' resources, based on their influence on public opinion, could help to protect the possibility of power alternation.

At the same time, politicians and citizens might tend to open new parties only if they have grassroots in society. Otherwise, the party will receive an insignificant, and perhaps unsustainable, number of vouchers. And small parties will only adhere to coalitions with which they have genuine ideological affinities. Or else, they will risk losing their grassroots support.⁸²⁷ Consequently, this legal framework also could have the potential to protect the party system and the system of government.

In sum, a legal framework that combines vouchers with a regulation of the concentration of parties' resources might be democratic, enhance the possibility of power alternation and protect the function of democracy.

⁸²⁶ TSE (Tribunal Superior Eleitoral), Assessoria de Comunicação, 'Horário eleitoral no rádio e TV começa nesta terça-feira (19)' (17 August 2014) <<http://www.tse.jus.br/imprensa/noticias-tse/2014/Agosto/horario-eleitoral-no-radio-e-tv-comeca-nesta-terca-feira-19>> accessed 26 October 2017.

⁸²⁷ If we are concerned with people's trust in the political system, Danielle May's finding that public funding enhanced that trust in countries where parties were required to demonstrate some level of public support and the thresholds for eligibility were low is noteworthy. She focused her statistical research on data from Denmark, the Netherlands and the UK. See, Danielle May, 'Political Party Funding and the Enigma of Trust' in Jonathan Mendilow and Eric Phélippeau (eds), *Handbook of Political Party Funding* (Edward Elgar Publishing 2018). I take that the proposal I present above complies with the requirements of showing public support and having low thresholds for eligibility.

9.4.2. A regulation based on the current hybrid system and control of influence over public opinion

Although the implementation of party vouchers would be ideal, a control of concentrations of parties' resources could also be implemented within the current Brazilian hybrid framework.

The more money a party has, the greater the opportunity it has to influence public opinion and reach potential voters, regardless of whether that money came from private or public sources. Under this scenario, not only would parties be limited to no more than 30% of the financial public funding (this is particularly important now that public money for parties has been substantially increased in the past few years⁸²⁸) and broadcast time, but parties would also be required to have no more than 30% of *the total party spending in an election or during a non-electoral period*. If we take the Schumpeterian approach of democracy, that cap could be set at 50%.

In a system with no party vouchers, typical electoral regulations are required to stimulate equality of opportunities between parties and candidates, if we take a Rawlsian perspective of democracy. The *cap on individuals' donations and third-party expenditures* should be low, to help to avoid the risk of distorting competition in favour of parties aligned with the wealthy (in other words, war chest corruption). Similarly, a low cap on the *use of own resources* by candidates is important, otherwise, the wealthy candidate's immediate access to a substantial personal fortune will give him an initial advantage that his less wealthy opponent may never overcome.⁸²⁹ Nonetheless, perhaps those three regulation have no place in a pure Schumpeterian conception of democracy.

⁸²⁸ See chapter three.

⁸²⁹ See, Mr Justice Thurgood Marshall in *Buckley v Valeo*. For a similar concern in the Brazilian Supreme Court, see Ms Justice Rosa Weber's opinion in STF, ADI 4650/DF, Inteiro Teor do Acórdão 305.

A uniform and general spending limit, in turn, is a complex issue because if we set a very low cap, we may automatically increase the voice of media owners.⁸³⁰ This is particularly disquieting in Brazil, where several congressmen own broadcast affiliates and/or retransmission stations, and/or newspapers.⁸³¹ If we set very low spending limits, we may decrease the chance of rivals having their voice heard at a level comparable to those politicians who own a media outlet. Thus, imposing quite low spending limits only makes sense in a more plural and diverse media structure, which is not the Brazilian case. Moreover, although it is controversial whether an incumbent has an inevitable competitive advantage and under what circumstances, we may end up favouring those who are in government. Thus, although spending limits are key to prevent an ever-growing electoral cost — and Brazil already adopts spending limits, as we have seen in chapter three —, its exact cap is a complex matter which must be extensively discussed, particularly in the context of Brazil's media structure.

Transparency is another 'of the requirements (of function) of an effective competition'.⁸³² It may be key not only in the current hybrid system, but also in an exclusive public finance system — voters and the electoral court should know how the vouchers were distributed, so they know how public money is being spent.⁸³³

Finally, under a Rawlsian perspective of democracy where everyone should have fair chances to run for political office, intra-party equality of opportunity is also important.

⁸³⁰ See subsection 7.3.2.

⁸³¹ See footnotes 135 and 747.

⁸³² Martin Morlok, 'Party Law as Competition Law' (2008) 2 *Legisprudence* 173 189.

⁸³³ For the relationship between public funding and transparency, see Graeme Orr, 'Justifications for Regulating Party Affairs: Competition not Public Funding' in Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (Routledge 2012) 248–249.

9.5. The sanctions

Unlawful practices regarding competition between parties must be sanctioned with a certain rigour. Otherwise, the party or its candidate will compare the benefit of doing the illegal anticompetitive conduct, with the cost of a possible sanction, and decide that it is simply not worthy complying with the norm.

The use of slush funds⁸³⁴ (known as *caixa dois*) is a popular concern in Brazil. The practice is sanctioned not only with the obligation of returning the illegal funds received from a prohibited source or their transfer to the National Treasury,⁸³⁵ but also with additional penalties.⁸³⁶ For instance, the party may lose its right to receive their share of the following year's party fund,⁸³⁷ and party leaders may face personal accountability.⁸³⁸ Moreover, persons involved in the slush fund practice may face criminal fines and jail — although it is questionable if enforcement has been effective in this sense.⁸³⁹ Finally, depending on the severity of the circumstances (that is, if it was serious enough to tarnish the legitimacy of the election), the slush fund practice may be characterised as an electoral abuse of economic power and may result in the cancellation of the electoral victory.⁸⁴⁰

⁸³⁴ A slush fund is 'an amount of money that is kept secretly for illegal or dishonest purposes'. 'slush fund' (Dictionary by Merriam-Webster) <<https://www.merriam-webster.com/dictionary/slush%20fund>> accessed 31 January 2019. In the Brazilian context, they usually mean off-the-books donations to parties and candidates. Estimates of the extent of slush funds are quite controversial, seem very imprecise, and often come from biased people (it seems difficult to hold an informer responsible for any uncertainty regarding a mere estimation). For some estimations in the Brazilian politics, see, eg, Carazza, *Dinheiro, Eleições e Poder: As Engrenagens do Sistema Político Brasileiro*, 35–36.

⁸³⁵ This was the sanction established by the Superior Electoral Court to the election held in 2018, and it will probably be extended to future elections. Resolução nº 23553/2017.

⁸³⁶ For a summary of the penalties, see Marilda de Paula Silveira, 'O desafio de reconhecer o caixa dois' *Jota* (24 September 2016) <<https://jota.info/colunas/e-leitor/e-leitor-o-desafio-de-reconhecer-o-caixa-dois-24092016>> accessed 26 October 2017.

⁸³⁷ Artigo 25, parágrafo único, Lei nº 9504/97 and artigo 77, parágrafo 4º, Res 23553/2017.

⁸³⁸ Artigo 77, parágrafo 5º, Res nº 23553/2017.

⁸³⁹ Article 350 of the Lei nº 4737, de 15 de julho de 1965, DOU 30/7/1965 (Electoral Code).

⁸⁴⁰ Artigo 30-A da Lei nº 9504/97. Moreover, electoral abuse of economic power may result in an eight years ineligibility period for the party and for those who were involved in the practice — artigo

Slush funds are particularly worrying if they are linked with *quid pro quo* corruption, for obvious reasons. But proving the *quid pro quo* may be quite a complex task.

Slush fund practices are no less disturbing if they result in war chest corruption, dominating the flow of communication and consequently distorting the electoral process itself.⁸⁴¹ Therefore, it may turn the election illegitimate.

However, it is unclear what is *sufficient* to distort an election. This is a decision to be made by the Brazilian electoral courts, and so far, they have been quite hesitant in cancelling elections that have been influenced by slush funds.⁸⁴² If we want to have a genuine competition between parties, we must discuss a clear criterion to be applied in these cases.

The framework advanced in this chapter suggests a clear criterion to solve that dilemma: *an election should be cancelled if the slush fund allowed the candidate, party or coalition to have more than 30% of the election's total spending*. Since we assume that 30% of the resources represents a predominant influence on public opinion, having spent more than that indicates that the election has been distorted. If we want to adopt a Schumpeterian conception of democracy, that cap may be adapted to 50%.

If the cancelation of an election sounds overly harsh, an alternative sanction could be the imprisonment of the party leader and the candidate. The important thing is that the sanction be severe, to stimulate politician compliance with the law.

22 da Lei Complementar nº 64, de 18 de maio de 1990, DOU 21/05/1990; and artigo 14, parágrafo 10, da Constituição da República Federativa do Brasil, 1988.

⁸⁴¹ See chapter one for a more detailed definition of war chest corruption.

⁸⁴² See, Salgado, 'Princípios Constitucionais Estruturantes do Direito Eleitoral' 258–284. A paradigmatic case along these lines was the decision of the Superior Electoral Court to keep president Michel Temer in office, by dismissing the accusations of illegal campaign funding regarding the 2014 election. The 4–3 majority of the Court basically dismissed the case relying on a procedural technicality, although there was robust evidence of illegal practices, such as a significant amount of slush fund. TSE, Aije nº 194358, Rel Min Herman Benjamin, DJE 12/09/2018, 48–54.

9.6. Conclusion of the chapter

The Brazilian Supreme Court has been ruling that all parties are entitled to a portion of public financial funding and free access to broadcasts, regardless of representation in the Chamber of Deputies. But the question is *how much* minorities are entitled to have.

Some justices have argued that political parties should operate under *full* equality of opportunity — that is, that distribution of public resources should be *strictly* equal. However, the approach that has prevailed within the majorities of the Court is that parties should operate under *graduated* equality of opportunity — that is, the more seats the political party has in the Chamber of Deputies, the more public funding and broadcast time the party should have.

Both approaches have their disadvantages. Full equality of opportunity may stimulate politicians to open new parties, and this may harm the party system (encourage pulverisation) and consequently the system of government (it may become harder to form a governing majority in Congress), impairing the workability of the political system. Graduated equality of chance, in turn, may harm the possibility of power alternation — make it less likely that power alternation will occur.

I have argued that a democratic solution to this controversy could be the implementation of vouchers (one for money and another one for time on broadcast) with caps. Party vouchers could help to solve the controversy regarding the distribution of parties' public resources since the distribution would be put in the hands of the people. But although vouchers are a good method to insulate the political sphere from inequalities in the economic sphere and to legitimise the distribution of parties' public resources, *they fail to provide a limit to inequality between political parties.*

Therefore, caps should be implemented to prevent *predominant influence on public opinion*. Under a Rawlsian perspective of democracy, a possible cap could be set at 30% — no political party or electoral coalition shall have more than 30% of party financial resources and 30% of broadcast time.

The control of the concentration of parties' resources could also be applied in the current hybrid Brazilian party funding legal framework. Under this scenario, parties or electoral coalitions would be limited to no more than 30% of total financial public funding, 30% of broadcast time and 30% of the total spending in an election.

The adoption of this paradigm (that is, influence on public opinion) provides a concrete solution to a recurrent problem within the enforcement of electoral law: as in many countries, Brazilian judges have struggled to determine what level of illegal spending (such as the ones derived from slush funds) is sufficient to distort an election and, consequently, have hesitated in the implementation of severe sanctions, such as the cancellation of an electoral victory. The framework proposed in this chapter offers a response to this dilemma: a sanction should be severe if the illegal practice allowed the party or coalition to have more than 30% of the total electoral spending. Since it is assumed that 30% of the resources represent a predominant influence on public opinion, having spent more than that indicates that the election has been distorted. Under a Schumpeterian perspective of democracy, that cap could be adjusted to 50%.

Chapter Ten

The conclusions of the thesis

10.1. The summary of the thesis

Part A of the thesis discussed how the Brazilian law of democracy is framed, with a focus on political finance.

The Brazilian federal electoral system appears to encourage the importance of money, as we saw in chapter two. Presidential candidates must reach potential voters all over the Brazilian territory (the fifth largest country in the world) and within its large population (the fourth largest electorate in the world). And candidates for Congress also have a large constituency: they need to reach potential voters all over the states where they run, which are usually large in terms of territory (for instance, larger than some European countries) and in terms of population (in the millions, most frequently). Although money is not sufficient to win elections, it is usually necessary, as the political science literature on Brazilian political finance shows;⁸⁴³ and, in any event, it is certainly a competitive advantage.

The main source of money for Brazilian parties and candidates was corporate contributions, between the 1994 and 2014 general elections. For example: corporate donations accounted for 74% of Brazilian political party and candidate funding in the 2010 general elections⁸⁴⁴ and 76% in the 2014 general elections.⁸⁴⁵ For many, including

⁸⁴³ See subsection 5.4.2.

⁸⁴⁴ Min Dias Toffoli, STF, ADI 4650/DF, Inteiro Teor do Acórdão 89.

⁸⁴⁵ Carazza, *Dinheiro, Eleições e Poder: As Engrenagens do Sistema Político Brasileiro*, 43.

the majority of justices at the Brazilian Supreme Court in the *ADI 4650* case, there was an appearance of war chest and dependence corruption. This was addressed in chapter three.

Part B then discussed the possible implications of that political finance system based on corporate donations on the democratic integrity of a branch of law that underpins the country's capitalism: antitrust.

Chapter four started by asking why the *appearance* of political finance corruption might be enough to justify reforms to the regulation, as the Brazilian and Australian Supreme Courts have inferred and as the Canadian Supreme Court has expressly declared. And it concluded that appearance might be enough because, although dependence and war chest corruption are hard to measure scientifically, their appearance affects people's trust in the integrity of elections. If people have less faith in the integrity of elections, they might feel less encouraged to meaningfully participate in democracy and, even worse, end up having less faith in their elected politicians. This can increase public support for non-democratic political regimes, which can eventually risk the continuation of the democratic system itself — a quite disquieting risk to take considering that not too long ago a military dictatorship was in force in Brazil. Nevertheless, a conclusion as to the *appearance* of political finance corruption must be made on reasonable grounds and be based on some social science evidence.

Chapter four also argued that the appearance of dependence and war chest corruption might result in a further problem: the appearance of corruption of the rules of capitalism. Elected politicians formulate many Brazilian capitalist rules and have the power to decide who will enforce them and how.

Chapter five then used a case study to analyse if we could discern any relationship between corporate donations and the softening of some provisions of the Competition Act 2011. Documentary research showed that business organisations have constantly lobbied against what they viewed as excessive interventions of antitrust bills throughout Brazilian history, and that CNI, the largest and most important Brazilian business association, continued that hegemonic lobbying pattern during the lawmaking of the Competition Act 2011.

After looking at amendments proposed during the legislative process, we saw that the more money an elected congressman received from companies that had been a defendant in an antitrust case, the more he tended to be concerned about excessively punishing companies for anticompetitive practices while proposing or rejecting amendments on issues that involved the list of anticompetitive practices and the fines for anticompetitive practices of the consolidated bill. These concerns were generally in affinity with the CNI's lobbying. And the amendments shaped the text of the Competition Act 2011. But, considering that it could not be scrutinised through statistics, the correlation found may be a matter of coincidence. Nevertheless, I asked: did the data shown *undermine* our ability to believe that corporate donations had nothing to do with a less interventionist Competition Act 2011? In my view, the answer is 'yes' because of the possibility that dependence or war chest corruption might explain the pattern found.

Chapter six, in turn, analysed if political finance corruption had any repercussion on the *enforcement* of antitrust legislation. In other words, once the legislation was already set, whether political finance corruption impacted its enforcement. I have discussed several ways by which political finance corruption can potentially harm the democratic integrity of antitrust enforcement. The harm may, in theory, occur through the democratic controls on Cade (the appointment process, the budget and human

resources setting process, and the natural and tacit restraint that agency's officers may have towards political bodies); and through the impact that political finance might have on political pressures and contacts.

However, I have argued, it is unclear how effective political pressures or contacts on Cade really have been; unclear to what extent Cade officers are naturally and tacitly restrained by the politicians seated in the Presidency of Republic and in the Congress; and we need more evidence on whether different parties in government may set different budget levels, and whether different levels of budget cause an increase or decrease of enforcement in practice.

Nevertheless, we do have more evidence about the *practical* impact of Cade *composition* on antitrust enforcement: there are records of large Brazilian corporate donors lobbying the executive and senators on nominations to Cade, suggesting that those firms believe that the agency's composition matters; there are reports indicating that politicians and their parties also believe that Cade's composition matters; and that belief shared by businessmen and politicians was statistically proven to be accurate in the empirical research of Moran and others on more than 5,091 merger cases, which found that enforcement varied according to the party that made the nomination.

In this way, if we have concluded in chapter three that war chest corruption apparently occurred in federal elections from 1994 to 2014 (obstructing the level playing field), we may argue that the democratic integrity of antitrust enforcement was apparently impaired because of the practical evidence suggesting that Cade's composition matters.

Part B, in sum, argued that the election's appearance of integrity is key to guaranteeing people's confidence in *democracy*, and that political finance corruption may harm that trust. It further argued that political finance corruption may harm the

confidence we should have in the democratic integrity of the rules of capitalism and, thus, this could be considered as an additional justification for the reform of political finance legislation. Moreover, it has implemented case studies on the implications of apparent political finance corruption for competition law and concluded that the confidence we should have in the democratic integrity of its lawmaking and enforcement has been impaired, at least partially. That said, it should be highlighted that the case studies did not question the legitimacy of the legislation; or of its enforcement. I am also not disputing their lawfulness. My claim is less bold. My argument is that the appearance of their democratic integrity was harmed, at least partially, which might be an additional justification (but surely not the main one) for a reform of the law of democracy.

If we want to protect the *capitalist democracy* established by the Constitution, perhaps we should try to have a political finance system which best avoids the appearance of corruption.

Although recent political finance reforms did ban corporate donations and establish spending limits, the current political finance system still largely allows economic inequality to be translated into political inequality and, as such, still largely permits the occurrence of political finance corruption.

Therefore, Part C asked how the Brazilian law of democracy should be framed in order to prevent the appearance of those kinds of corruption.

I argued that the legislation should foster the appearance of electoral integrity in the sense that elections actually reflect a *free formation of public opinion*. Along those lines, I offered a reform of the Brazilian law of democracy in relation to economic resources that enable concentration of political speech. Consequently, I proposed a

regulation that went beyond political finance, by covering also media regulation, particularly of the traditional media.

Chapter seven focused on the theoretical foundations of the proposal. And, by adopting a Rawlsian⁸⁴⁶ interpretation of the Brazilian Constitution, it argued that there should be no concentrations of political speech derived from economic resources, meaning: no concentration of *private money in politics*; no concentration of *media resources*; and no concentration of *political parties' and candidates' economic resources to compete*. However, a complete intolerance of concentration is not desirable in the media sector and in the competition between political parties, even when assuming a Rawlsian perspective of democracy. Therefore, chapter seven argued that the principle in those arenas should be that no one, or no group, should have resources that allow a *predominant influence on public opinion*. By focusing on promoting equality of opportunity (helping to prevent the appearance of war chest corruption), the regulation also ends up helping that private donations or expenditures do not change the elected politician's attitude (helping to prevent the appearance of *quid pro quo* and dependence corruption).

Chapter eight then explored the implications of that paradigm for the political competition between non-candidate citizens and their groups.

With respect to citizens who make a political donation or expenditure, I proposed a twofold regulation: the first step would be the implementation of vouchers or uniform low caps for individuals' donations and expenditures, to help to avoid economic inequalities turning into political ones; and the second step would be the introduction of legislation aimed to avoid bundling.

⁸⁴⁶ As such, it was grounded on normative values that transcend the instrumental one mentioned.

With respect to the media, I argued that there is a constitutional reason why it should be considered part of the Brazilian electoral regulation: considering that the Constitution requires that elections should take place without the influence of economic power, as far as possible; and that the media is the form of economic power which most influences the forum of political deliberation; it follows that the Brazilian media structure should be designed so to mitigate the impact of media power over elections. Although the emergence of social media and messaging apps changed the dynamics of political deliberation, we should not overestimate its impact. Firstly, more Brazilians consume news about politics through television than the internet as of February 2019. Secondly, the discussion within the internet is largely constrained by the content produced by the traditional media published online (who produce, by far, the most trustworthy news in the eyes of most Brazilians). Therefore, regulation of the traditional media is still important to the country's democratic deliberation.

Legislation regarding political parties' access to broadcast and the impartiality of broadcast corporations during elections is not (and perhaps will never be) enough to satisfactorily diminish the influence of media economic power over elections. Therefore, chapter eight suggested regulation of the traditional media based on democratic distribution and power to impact public opinion. Since it seems unsustainable to have a complete dispersal of media structure (because private media can be an effective instrument to hold the government to account), the proposal focused on reducing concentration. A negative measure was suggested: the regulation of media ownership concentration. In this respect, perhaps Brazil could learn lessons from Germany, where 30% of the aggregate audience in the broadcasting market is assumed to represent a 'predominant influence on public opinion'. Although the German assumption is related to broadcasting, under the principle of democratic media distribution that assumption could be expanded to other media markets, such as the press. Any merger above those

limits would be rejected. For those of a Schumpeterian perspective of democracy, that cap could be adjusted to 50%. And a positive measure could be the distribution of subsidies to not only empower media outlet to different groups within society, but also encourage the translation of plurality of ownership into diversity of content — however, the greatest challenge for the implementation of direct subsidies seems to be the difficulty in choosing appropriate criteria for distribution. Finally, it could also be appropriate to establish an independent public television channel with a proper level of funding, as a forum for people to hear and evaluate diverse views.

The regulation of political competition between non-candidate individuals and their groups may be *indirectly* relevant to the competition between parties and their candidates: the regulation of the concentration of political donations and expenditures might be helpful to prevent the risk of war chest corruption (that could benefit parties and candidates aligned with the wealthy); and the regulation of the media structure and the diverse debate within it might be helpful to prevent a concentrated and uniform media (which could benefit parties and candidates that are aligned with media's hegemonic discourse).

Finally, chapter nine discussed the direct implications of the public opinion paradigm for the political competition between political parties and their candidates. In this sense, it suggested vouchers (one for money and another one for time on broadcast), with caps. Vouchers would help to solve the controversy (within the Supreme Court and society in general) regarding the distribution of parties' public resources since this distribution would be put in the hands of the people. However, to prevent *predominant influences on public opinion*, caps would have to be implemented. A possible cap could be set at 30% — no political party or electoral coalition shall have more than 30% of parties' financial resources and 30% of the broadcast time.

Control of the concentration of party resources could also be implemented in the current hybrid Brazilian party funding system: no party or electoral coalition would be allowed to have more than 30% of the total financial public funding, 30% of the broadcast and 30% of the total spending in the election.

The adoption of the public opinion paradigm offers an answer to the dilemma faced by Brazilian judges whenever they must determine what level of illegal spending (such as the ones derived from slush funds) is sufficient to distort an election. Under the public opinion paradigm, that level is clear: if the illegal practice allowed the candidate, party or coalition to have more than 30% of the total electoral spending, there is a presumption that it has distorted the election. Under a Schumpeterian perspective of democracy, that presumption could be adjusted to 50%.

10.2. The challenges ahead

There are many ways how future research can help us to understand, in one way or another, some of the topics addressed in this thesis.

To help the understanding of the legislative process of the Competition Act 2011 addressed in chapter five, it could be useful future research to interview relevant actors who took part in that process, to hear their perspectives. In addition, a new dimension of empirical studies could emerge if lobbying practice starts being regulated in Brazil, generating data that will produce more information about the activity.

Moreover, future research has much to explore in relation to the repercussions of elections on antitrust enforcement discussed in chapter six. For instance, future empirical research about whether cartel and abuse of dominant position enforcement have varied according to the administration that was in office would be welcomed. Empirical research on antitrust enforcement could also address the role of donations.

Also relating to empirical studies, research could be expanded to determining causal relationships with respect to dependence corruption (by isolating money as the sole factor that altered the decision-making of an elected politician), war chest corruption (by exploring the subtle ways in which political advertising influences human behaviour) and media structure (by exploring the causal relationship between media content and political results), as far as feasible.

When it comes to the discussions addressed in Part C (chapters seven, eight and nine), research could evolve along at least three lines of investigation — all of them concerned with the organisation and distribution of resources in the economic sphere and how they somehow translate to the political sphere.

Firstly, the assumptions held by some antitrust scholars that *economic concentrations tend to generate political influence*, or as some have argued even further, *economic concentrations tend to generate political concentrations*, will be left to another discussion. Possible future investigations could focus on whether those assumptions are always true; and, if so, how that works in practice. In other words, what is the *modus operandi*: if it is a structural problem (such as the too big to fail issue); or if larger corporations tend to make more political donations and independent expenditures; or if larger firms tend to make other types of political spending; or if it is all those things together. Moreover, there is a need to establish whether different corporations have different *modus operandi*.

Secondly, academic research could also expand in determining how, and to what extent, socioeconomic inequalities constrain participation in the forum of political deliberation. In this way, the limitations underprivileged people may face in political participation regarding their lack of political donations and expenses and, in a broader deliberative sense, whether and how underprivileged individuals face a competitive

disadvantage when formulating political arguments because of potential adversities on education, could be discussed.

Thirdly, it is to be observed how internet deliberation will evolve, as will its impact be on political deliberation generally. Depending on how the internet evolves, discussions will be necessary as to whether there should be a democratic control of the algorithms of online platforms such as Facebook and Google. This could be nominating scientific institutions to act as trustees of these algorithms, in order to enhance transparency and public trust. A particular challenge in relation to algorithms is that it is a transnational issue: the corporations are frequently American but operate worldwide, impacting many countries. Another topic awaiting observation is the evolution of the fake news phenomenon, especially with respect to its extent.

Finally, future research could also incorporate discussions about the impact that independent government bodies have on the forum of political deliberation, such as the release of investigations by the police during elections.

Democracy is in constant evolution. Political deliberation is frequently impacted by the emergence of new technologies — although we should be careful not to overestimate their actual impact. And economic power will always try to find a loophole in legislation to support political parties and their politicians — as coined by Keith Ewing, political finance regulation is like a game of chess with contested moves to intractable problems.⁸⁴⁷ The transformation of democracy, in these ways, is endless. Academic research should be no different.

⁸⁴⁷ Interview with Keith Ewing, 2015 (as cited in Sam Power, 'The British Party Funding Regime at a Critical Juncture? Applying New Institutional Analysis' (2017) 37 Politics 134 144).

Appendix

Questionnaire about political pressure sent to former commissioners of Cade

(See section 6.1 of the thesis)

INFORMATION SHEET FOR PARTICIPANTS

REC Reference Number: HR-16/17-2546



Understanding the political pressure on CADE

I would like to invite you to participate in this research project, which forms part of my PhD research at King's College London. You should only participate if you want to. Choosing not to take part will not disadvantage you in any way. Before you decide whether you want to take part, it is important for you to understand why the research is being done and what your participation will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask me if there is anything that is not clear or if you would like more information.

What is the purpose of the study?

The aim of this study is to provide a better understanding of the political pressure on CADE. I am specifically interested in analysing which economic sectors are the ones that exercise most political pressure on CADE.

Why have I been invited to take part?

You are a former commissioner of CADE. As a former commissioner of CADE, you are in a unique position to provide information about whether political pressure on CADE has been taking place, and if so by whom and in what form.

Do I have to take part?

Participation is voluntary. You do not have to take part. You should read this information sheet and if you have any questions you should ask the research team.

What will happen to me if I take part?

You will receive an e-mail by Bristol Online Survey (BOS), so you can complete an anonymous and confidential online survey.

The survey will take approximately 10 minutes.

You will be basically asked questions about contact made by politicians. There is also one question about the media coverage of antitrust cases.

Even if you have decided to take part, you are still free to stop your participation at any time during the online survey, without giving reason. The information provided during the questionnaire will not be considered until you submit the survey.

Once you submit the survey, you will not be able to withdraw because the survey is anonymous.

The submission of the questionnaire implies consent. Withdrawal is not possible after you submit the survey.

What are the possible benefits and risks of taking part?

The information I get from the study will help to further understand the political pressure on CADE. Furthermore, I will provide you with a summary of a final report describing the main findings. The main disadvantage to taking part in the study is that you will be donating around 10 minutes of your time to take part.

There are no foreseeable risks in participating in the study. However, this researcher believes that there is no method that can guarantee 100% anonymisation and confidentiality and therefore the absolute absence of risks in this sense. All methods (online survey, physical mail or reunite all former commissioners in a room to respondent the questionnaire) have their weakness. Therefore, this researcher believes that would be dishonest to guarantee the absolute nonexistence of risks.

Having that in mind, however, this researcher is adopting the best to his knowledge online platform: the Bristol Online Survey (BOS), an online survey tool produced and run by the University of Bristol, and used in around 130 UK universities. BOS is an online survey tool designed for Academic Research. It is frequently used by many academic researchers on sensitive topics — possibly even more sensitive than the ones asked in this survey.

BOS is designed to protect respondent anonymity. BOS does not use cookies for survey completion and external tracking software such as Google Analytics is not supported on BOS surveys. Additionally, I cannot access any information about respondents' IP addresses (see <https://www.onlinesurveys.ac.uk/help-support/respondent-anonymity-and-bos/>).

Therefore, I believe that the risks of breach of the anonymisation of the questionnaire are very low.

Will my taking part be kept confidential?

No data will be able to be linked back to any individual taking part in the survey. All data for analysis will be anonymised.

Moreover, while reporting the research findings, I will not quote anything that you possibly write. What is said in the survey is regarded as strictly confidential and will be held securely until the research is finished.

No data will be accessed by anyone other than me and information will be handled in accordance with the terms of the UK Data Protection Act 1998 and the Brazilian Internet Bill of Rights (Law n. 12.965/2014).¹ In addition, the replies to the questionnaires will come to me as anonymous. Therefore, even I will not know what you have specifically replied.

Data will be presented together for all of the participants, thus, there will be nothing that would identify an individual. You will not be identifiable in any part of the work. In other words, it will not be used in a manner which would allow identification of your individual responses.

There will *not* be any kind of comparison between ‘the CADE appointed the Social Democrat Party (PSDB)’ and ‘the CADE appointed by the Workers Party (PT)’. There will *not* be any kind of party comparisons.

Having that in mind, the economic sectors that have made political pressure will be listed in a generic way, so that it will not be possible or that it will be greatly minimised any form of identification of period, even if directly. Most, if not all, of the largest economic sectors in Brazil have had many cases during both administrations. In this sense, all data will be presented as ‘since 1994’. This is an example of a conclusion that the study aims: ‘since 1994, the X economic sector have put political pressure on CADE X times, through congressmen’.

¹ All survey responses will be collected by BOS over encrypted SSL (TLS) connections. As stated by BOS: ‘SSL is the standard technology for establishing an encrypted link between a web server and a browser. It ensures that sensitive information can be transmitted securely. All communications within onlinesurveys.ac.uk are also sent over SSL encrypted connections. BOS user passwords are encrypted using PBKDF2 with a SHA256 hash and a random salt’ (see <https://www.onlinesurveys.ac.uk/help-support/bos-security/>).

All data will be stored on servers located at the University of Bristol, United Kingdom. According to BOS, ‘access to sensitive data via BOS is strictly limited to BOS’s support and technical teams. This access is only permitted when it is at the request of the client concerned or necessary for the investigation of operational issues (or when required by law). The BOS servers and backups are accessible only by members of the BOS technical team and other authorised members of IT Services within the University of Bristol (such as systems administrators or those responsible for maintaining the backup service).[...] All new staff at the University of Bristol, including casual staff, are given a contract of employment containing a confidentiality clause and are made aware of their responsibilities toward restricted university data and personal data as part of their induction process. All University of Bristol IT staff are provided with data security training’ (see <https://www.onlinesurveys.ac.uk/help-support/bos-security/>).

You will not be asked to give any congressman's name or name the case in which the pressure took place. You will be able to skip any question.

I will keep self-identified contributions or contributions that have identified others as confidential.

In sum, confidentiality and anonymity will be maintained and it will not be possible to identify you in any publications.

What will happen to the results of the study?

The data collected will be collected and analysed at King's College London. As referred, data will be presented together for all of the participants, thus, there will be nothing that would identify an individual. You will not be identifiable in any part of the work.

The final report will summarise the main findings. This report will be sent to you. The report might be used in my PhD thesis, and might also be written up as a research paper for publication in an academic journal. It is possible that my thesis will be published as a book, which would include points of the final report. You will not be identified as having taken part in the study.

How is the project being funded?

My PhD is funded by CAPES Foundation (www.capes.gov.br) — process n. BEX 1646-15/0.

Who should I contact for further information?

If you have any questions or require more information about this study, please contact me using the following contact details:

Arthur Guerra de Andrade Filho

The Dickson Poon School of Law

King's College London

Strand Campus

London

WC2R 2LS

arthur.andrade_filho@kcl.ac.uk

If this study has harmed you in any way or if you wish to make a complaint about the conduct of the study you can contact King's College London using the details below for further advice and information:

Professor Keith D. Ewing

The Dickson Poon School of Law

King's College London

Strand Campus

London

WC2R 2LS

keith.ewing@kcl.ac.uk

Thank you for reading this information sheet and for considering taking part in this research.

THE CONTENTS OF THIS FORM ARE *ABSOLUTELY CONFIDENTIAL*.
INFORMATION IDENTIFYING THE RESPONDENT WILL NOT BE DISCLOSED
UNDER ANY CIRCUMSTANCES.

Instructions:

- Questions are multiple choice. In other words, you always can choose more than one answer.
- All questions have space for comments. Please comment, if you would like to.
- No one should be named nor should their identity otherwise be revealed.

Thank you!

PART A

While working as a Commissioner in CADE

1. Have you ever been contacted by any of the following regarding an antitrust case to be decided by CADE:

- a) A politician.
- b) A member of the politician's staff.
- c) A person who claimed to be acting on behalf of a politician
- d) A political party.
- e) A lobbyist.
- f) None.
- g) I don't remember.
- h) I don't know.
- i) Skip this question.

Please comment, if you would like to:

2. If the answer to question 1 is yes, and if the person making the contact was a), b) or c), was the politician(s):

- a) A member of the legislature.
- b) A member of the executive.
- c) Other. Please specify: _____.
- d) I don't remember.
- e) I don't know.
- f) Skip this question.

Please comment, if you would like to:

3. If the answer to question 1 is yes, when was the contact made:

- a) Before a case was heard.
- b) While a case was being heard.
- c) After a case was heard.
- d) Other. Please specify: _____.
- e) I don't remember.
- f) I don't know.
- g) Skip this question.

Please comment, if you would like to:

4. If the answer to question 1 is yes, to which sector(s) did the case(s) relate:

- a) Agribusiness (including meat processing, orange juice, sugar cane).
- b) Banking.
- c) Beverage.
- d) Construction.
- e) Mining.

- f) Other. Please specify: _____.
- g) I don't remember.
- h) I don't know.
- i) Skip this question.

Please comment, if you would like to:

5. If the answer to question 1 is yes, what was/were the reason(s) for the contact? Please specify as fully as possible.

Skip this question.

6. If the answer to question 1 is yes, did the person promised or treated you with any of the following:

- a) More funding and/or human resources to CADE.
- b) Political support for the approval of a competition bill (or a specific provision of the competition bill) that will benefit or is in the interests of the competition authority.
- c) Political support for the reappointment process or the appointment for another job after the mandate.
- d) Less funding and/or human resources to CADE.
- e) Make a law to curb the CADE's powers.
- f) Open a CPI (Congressional Committee of Investigation) about the case.
- g) I don't remember.
- h) Skip this question.

Please comment, particularly if other kinds of threats or promises were made:

7. In what circumstances do you think it would be improper for any of the categories of persons in Question 1 to contact a Commissioner?

Skip this question.

8. If you have been contacted by any of the foregoing categories of person, did you consider any of the contacts to be improper in any way? Please give reasons.

Skip this question.

PART B

During the process of nomination of your name to CADE by the president of the Republic and subsequent approval by the Senate:

1. Did anybody contact you EXPLICITLY offering his/her support to your nomination and/or approval in exchange for a certain decision towards a specific antitrust case?

- a) Yes.
- b) No.
- c) Skip this question.

Please comment, if you would like to.

2. If the answer to question 1 is yes, what position did he/she/they hold?

- a) A politician.
- b) A member of the politician staff.
- c) A person who claimed to be acting on behalf of a politician
- d) A political party.
- e) A lobbyist.
- f) I don't know.
- g) I don't remember.
- h) Skip this question.

Please comment, if you would like to:

3. If the answer to question 1 is yes, and if the person making the contact was a), b) or c), was the politician(s):

- g) A member of the legislature.
- h) A member of the executive.
- i) Other. Please specify:_____.
- j) I don't remember.
- k) I don't know.
- l) Skip this question.

Please comment, if you would like to:

4. If the answer question 1 is yes, to which sector(s) did the case(s) relate:

- j) Agribusiness (including meat processing, orange juice, sugar cane).
- k) Banking.
- l) Beverage.
- m) Construction.
- n) Mining.
- o) Other. Please specify:_____.
- p) I don't remember.
- q) I don't know.
- r) Skip this question.

Please comment, if you would like to:

PART C

1. Have you ever felt pressured to make a decision because of the media's opinion about a certain antitrust case?

- a) Yes.
- b) No.
- c) Skip this question.

Please comment, if you would like to:

2. If the answer to question 2 is yes, in how many cases did you feel pressured?

Skip this question.

Thank you!

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